

No. 13042

United States
Court of Appeals
for the Ninth Circuit.

DOUGLAS HEAY,

Appellant,

vs.

DEAN PHILLIPS, CHARLES GRAY and
JAMES KELLY,

Appellees.

Transcript of Record

Appeal from the District Court
for the Territory of Alaska
Fourth Division

FILED

DEC 17 1951

PAUL P. O'BRIEN

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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ATTORNEYS OF RECORD

GEORGE B. McNABB, JR.,

Attorney for Plaintiffs & Appellee,
Fairbanks, Alaska.

ROBERT A. PARRISH,

Attorney for Plaintiffs & Appellee,
Fairbanks, Alaska.

WILLIAM V. BOGGESE,

Attorney for Defendant & Appellant,
Fairbanks, Alaska.

In the District Court for the District of Alaska,
Fourth Division

No. 6690

DEAN PHILLIPS, CHARLES GRAY, and
JAMES KELLY,

Plaintiffs,

vs.

DOUGLAS HEAY,

Defendant.

COMPLAINT

Comes Now the above-named Plaintiffs and for
cause of action allege:

I.

That on September 20, 1950, the Plaintiffs were
the owners of a Piper Super Cruiser aircraft, the
same having a 115 horsepower engine.

II.

That on or about said day and at the request and
insistence of the Defendant, the Plaintiffs did lend
said aircraft to the Defendant.

III.

That at approximately 11:00 o'clock a.m. at or
near Paxon Lake, Alaska, on the 20th day of Sep-
tember, 1950, and while said aircraft was in the ex-
clusive possession and control of Defendant and
while Defendant was operating same, said aircraft
collided with the ground and was totally and com-
pletely destroyed. [1-A*]

*Page numbering appearing at foot of page of original Certified
Transcript of Record.

IV.

That subsequent to the destruction of said aircraft, the Defendant did promise and agree to immediately pay unto the Plaintiffs the sum of \$3,000.00 as the reasonable value of and for said aircraft.

V.

That to the date hereof, Defendant has paid unto the Plaintiffs only the sum of \$650.00.

VI.

That there is now due and owing from Defendant to Plaintiffs the unpaid balance of \$2,350.00, which amount the Plaintiffs have demanded of Defendant, but the Defendant has failed and refused to pay.

Wherefore, Plaintiffs pray judgment against the Defendant as follows:

1. For the sum of \$2,350.00 with interest thereon at the rate of six (6) per cent per annum from the 1st of October, 1950.

2. For Plaintiffs' costs and disbursements herein, together with a reasonable sum as and for Plaintiffs' attorney fees.

3. For such other and further relief as to the Court may seem just and equitable.

/s/ GEORGE B. McNABB, JR.,
Attorney for Plaintiffs.

[Endorsed]: Filed January 24, 1951. [2]

[Title of District Court and Cause.]

ANSWER

Comes now the above-named defendant and for answer to plaintiffs' complaint on file herein, admits, denies and alleges as follows:

1.

Defendant admits the allegations of Paragraph 1 of Plaintiffs' Complaint.

2.

Defendant admits that part of Paragraph 2 of Plaintiffs' amended complaint which states "the plaintiffs did lend said airplane to the defendant" and denies each and every other allegation contained therein.

3.

Defendant admits the allegations contained in Paragraph 3 of Plaintiffs' amended complaint.

4.

Defendant denies the allegations contained in paragraph 4 of plaintiffs' amended complaint.

5.

Defendant admits the allegations contained in paragraph 5 of plaintiffs' amended complaint.

6.

Defendant denies the allegations contained in paragraph 5 of plaintiffs' amended complaint.

Wherefore, having answered plaintiffs' amended

complaint, defendant [3] prays that plaintiffs' complaint be dismissed and the defendant do have a recover from the plaintiffs a reasonable attorney fee to be allowed by the court.

/s/ WARREN A. TAYLOR,
Attorney for Defendant.

Receipt of Copy acknowledged.

[Endorsed]: Filed March 31, 1951. [4]

[Title of District Court and Cause.]

AMENDED COMPLAINT

Comes Now the above-named plaintiffs and for cause of action allege:

I.

That on September 20, 1950, the Plaintiffs were the owners of a Piper Super Cruiser aircraft, the same having a 115 horsepower engine.

II.

That on or about said day and at the the request and insistence of the Defendant, the Plaintiffs did lend said aircraft to the Defendant for and in consideration of Defendant's promise to repair said aircraft if damaged or to pay the reasonable value of same if destroyed while in Defendant's possession.

III.

That at approximately 11:30 o'clock a.m. at or near Paxson Lake, Alaska, on the 20th day of Sep-

tember, 1950, and while said aircraft was in the exclusive possession and control [5] of Defendant and while Defendant was operating same, said aircraft collided with the ground and was totally and completely destroyed.

IV.

That subsequent to the destruction of said aircraft, the Defendant did in compliance with his aforementioned promise agree to immediately pay unto the Plaintiffs the sum of \$3,000.00 as the reasonable value of and for said aircraft.

V.

That to the date hereof, Defendant has paid unto the Plaintiffs only the sum of \$650.00.

VI.

That there is now due and owing from Defendant to Plaintiffs the unpaid balance of \$2,350.00, which amount the Plaintiffs have demanded of Defendant, but the Defendant has failed and refused to pay.

Wherefore, Plaintiffs pray judgment against the Defendant as follows:

1. For the sum of \$2,350.00 with interest thereon at the rate of six (6) per cent per annum from the 1st of October, 1950.

2. For Plaintiffs' costs and disbursements herein, together with a reasonable sum as and for Plaintiffs' attorney fees.

3. For such other and further relief as to the [6] court may seem just and equitable.

/s/ GEORGE B. McNABB, JR.,
Attorney for Plaintiffs.

James Kelly, first being duly sworn, on his oath deposes and says: That he is one of the Plaintiffs in the above-entitled cause; that he has read the above and foregoing complaint, knows the contents thereof and the same is true.

/s/ JAMES W. KELLY.

Subscribed and Sworn to before me this 19th day of March, 1951.

[Seal] /s/ GEORGE B. McNABB,
Notary Public in and for
Alaska.

My Commission expires: 4/10/54.

Receipt of Copy acknowledged.

[Endorsed]: Filed March 19, 1951. [7]

[Title of District Court and Cause.]

SECOND AMENDED COMPLAINT

Come Now the above-named Plaintiffs and for cause of action allege:

I.

That on September 20, 1950, the Plaintiffs were the owners of a Piper Super Cruiser aircraft, the same having a 115 horsepower engine.

II.

That on or about the said day and at the request and insistence of the Defendant, the Plaintiffs did lend said aircraft to the Defendant for and in consideration of Defendant's promise to repair said aircraft if damaged or to pay the reasonable value of same if destroyed while in Defendant's possession.

III.

That at approximately the hour of 11:00 o'clock a.m. at or near Paxson Lake, Alaska, on the 20th day of September, 1950, and while said aircraft was in the exclusive possession and control of Defendant and while Defendant was operating same, said aircraft collided with the ground and was totally and completely destroyed. [8]

IV.

That subsequent to the destruction of said aircraft, the Defendant did in compliance with his aforementioned promise agree to immediately pay unto the Plaintiffs the sum of \$3,000.00 as the reasonable value of and for said aircraft.

V.

That to the date hereof, Defendant has paid unto the Plaintiffs only the sum of \$650.00.

VI.

That there is now due and owing from Defendant to Plaintiffs the unpaid balance of \$2,350.00, which amount the Plaintiffs have demanded of Defendant, but the Defendant has failed and refused to pay the same.

Come Now the Plaintiffs above named, and for a second, further and alternative cause of action allege as follows:

I.

That on September 20, 1950, the Plaintiffs were the owners of a Piper Super Cruiser aircraft, the same having a 115 horsepower engine.

II.

That on or about said the Plaintiffs did, at the request of the Defendant, lend to the Defendant said aircraft for the purpose of making a trip to Paxson and Tangle Lakes, Alaska, to transport a mechanic to repair the aircraft previously wrecked by the Defendant in the vicinity of said lakes.

III.

That at approximately 11:00 a.m. at or near Paxson Lake, Alaska, on or about the 20th day of September, 1950, and while said aircraft was in [9] the exclusive possession and control of the Defendant and while Defendant was operating the same,

said aircraft collided with the ground and was totally and completely destroyed, through the negligence of the Defendant in operating said aircraft.

IV.

That subsequent to the destruction of said aircraft, the Defendant did in compliance with his aforementioned promise, agree to immediately pay unto the Plaintiffs the sum of \$3,000.00 as the reasonable value of and for said aircraft.

V.

That to the date hereof, Defendant has paid unto the Plaintiffs only the sum of \$650.00.

VI.

That there is now due and owing from Defendant to Plaintiffs the unpaid balance of \$2,350.00, which amount the Plaintiffs have demanded of Defendant, but the Defendant has failed and refused to pay the same.

Wherefore, Plaintiffs pray judgment against the Defendant on their First Cause of Action or on their Second Cause of Action as follows:

1. For the sum of \$2,350.00 with interest thereon at the rate of six (6) per cent per annum from the 1st of October, 1950.

2. For Plaintiffs' costs and disbursements herein, together with a reasonable sum as and for Plaintiffs' attorney fees.

3. For such other and further relief as to the Court may seem just and equitable.

/s/ GEORGE B. McNABB, JR.,
Attorney for Plaintiffs. [10]

James Kelly, first being duly sworn, on his oath deposes and says: That he is one of the Plaintiffs in the above-entitled cause; that he has read the above and foregoing complaint, knows the contents thereof and the same is true as he verily believes.

/s/ JAMES KELLY.

Subscribed and Sworn to before me this 7th day of May, 1951.

[Seal] /s/ JOANNE R. BULLOCK,
Notary Public in and for the
Territory of Alaska.

My Commission Expires March 21, 1955.

Receipt of Copy acknowledged.

[Endorsed]: Filed May 7, 1951. [11]

[Title of District Court and Cause.]

**ANSWER TO PLAINTIFFS' SECOND
AMENDED COMPLAINT**

Comes now the Defendant and for answer to Plaintiffs' Second Amended Complaint alleges and avers as follows:

I.

Admits the allegations contained in paragraphs I, III and V.

II.

Denies the allegations contained in paragraphs II, IV and VI.

For answer to Plaintiffs' second, further and alternative cause of action contained in Plaintiffs' Second Amended Complaint, Defendant alleges and avers as follows:

I.

Admits the allegations contained in paragraphs I and V.

II.

Denies the allegations contained in II, III, IV and VI.

Wherefore, having answered plaintiffs' Second Amended Complaint, defendant prays that the same be dismissed and the defendant do have and recover from the plaintiffs a reasonable attorney's fee to be allowed by the Court.

/s/ WILLIAM V. BOGGESS,
Attorney for Defendant.

Receipt of Copy acknowledged.

[Endorsed]: Filed May 8, 1951. [12]

[Title of District Court and Cause.]

AFFIDAVIT FOR ATTACHMENT

United States of America,

Territory of Alaska, Fourth Division—ss.

I, Dean Phillips, being duly sworn, say: That I am one of the plaintiffs in the above-entitled action, and make this affidavit for the purpose of securing the issuance of a writ of attachment out of the above-entitled court against the property of the said defendant; that the defendant above named is indebted to the above-named plaintiffs in the sum of Two Thousand Four Hundred Sixty-four & no/100 Dollars (\$2,464.00) over and above all legal set-offs and counter-claims upon an oral contract for the direct payment of money, to wit: reasonable value of and for Plaintiffs' aircraft.

That the payment of the same has not been secured by any mortgage, lien, or pledge upon real or personal property; that said sum, for which the attachment is asked in the above-entitled action, is an actual, bona fide, existing debt, due and owing from the said defendant to the said plaintiff, and that the said attachment is not sought nor is said action prosecuted to hinder, delay, or defraud any creditor of the said defendant.

/s/ DEAN W. PHILLIPS.

Subscribed and sworn to before me this 24th day of January, A.D. 1951.

[Seal] /s/ GEORGE B. McNABB, JR.,
Notary Public in and for the Territory of Alaska.

My commission expires 4/10/54.

[Endorsed]: Filed January 24, 1951. [13]

[Title of District Court and Cause.]

UNDERTAKING FOR ATTACHMENT

Whereas, the above-named plaintiffs have commenced an action in the above-entitled court to recover from the above-named defendant the sum of Two Thousand Four Hundred Sixty-four Dollars (\$2,464.00) on a contract for the direct payment of money, and are desirous that a writ of attachment issue out of said court against property of the said defendant:

Now, Therefore, we, Dean Phillips as principal, and Charles Gray and James Kelly as sureties, in consideration of the issuance of said writ of attachment, do hereby jointly and severally promise and undertake in the sum of Two Thousand Four Hundred Sixty-four Dollars (\$2,464.00) that the plaintiffs above named will pay all costs that may be adjudged to the above-named defendant and all damages that he may sustain by reason of such attachment if the same be wrongful or without sufficient cause, not exceeding the sum of \$2,464.00.

In Witness Whereof we have hereunto set our

hands and seals this 24th day of January, A.D. 1951.

[Seal] /s/ DEAN PHILLIPS,
Principal.

[Seal] /s/ CHARLES GRAY,
!s/ JAMES KELLY.
Sureties.

United States of America,
Territory of Alaska, Fourth Division—ss.

I, Charles Gray, and I, James Kelly, each being duly sworn, say: That I am a surety on the foregoing undertaking; that I am a resident within the Territory of Alaska; that I am not a counselor or attorney at law, marshal, deputy marshal, commissioner, clerk of any court, or other officer of any court and that I am worth the sum of Four Thousand Nine Hundred Twenty-eight Dollars (\$4,928.00) over and above all debts and liabilities and property exempt from execution.

/s/ CHARLES GRAY.

/s/ JAMES KELLY.

Subscribed and sworn to before me this 24th day of January, A.D. 1951.

[Seal] /s/ GEORGE B. McNABB, JR.,
Notary Public in and for the
Territory of Alaska.

My commission expires 4/10/54.

[Endorsed]: Filed January 24, 1951. [14]

[Title of District Court and Cause.]

ATTACHMENT WRIT

The President of the United States of America,

To the Marshal of the District of Alaska,

Division No. 4, Greeting:

Whereas, Dean Phillips, Charles Gray and James Kelly hath complained that Douglas Heay is justly indebted to them to the amount of Two Thousand Four Hundred Sixty-four Dollars and no/100 cents and the necessary affidavit and undertaking herein having been filed as required by law;

We Therefore Command You, That you attach and safely keep all the property of the said defendant not exempt from execution, or so much thereof as may be sufficient to satisfy the plaintiffs' demand, as above stated, to be found in your Division of said District, and as shall be of value sufficient to satisfy the said debt and the costs and disbursements of the said plaintiff herein. And of this writ make due service and return.

Witness, the Hon. Harry E. Pratt, Judge of said Court, and the seal thereof affixed at Fairbanks, in said District, this 24th day of January, 1951.

[Seal]

JOHN B. HALL,
Clerk.

By /s/ OLGA T. STEGER,
Deputy. [15]

[Title of District Court and Cause.]

NOTICE OF GARNISHMENT

To Firemen's Metropolitan Insurance Co.,
220 Bush Street, San Francisco, California.

You will please take notice that all moneys, gold dust, goods, credits, effects, debts due or owing, and all other personal property in your possession or under your control, belonging to or owing to the defendant named in the writ of attachment, of which the annexed is a true copy, is hereby attached by virtue of said writ. And you are hereby notified not to pay over to or transfer or deliver the same or any part thereof to the said defendant or anyone but the undersigned United States Marshal for the Fourth Division, Territory of Alaska.

Please furnish statement as provided under Section 55-6-69, ACLA, 1949.

Dated at Fairbanks, Alaska, this 24th day of January, 1951.

THEODORE R. McROBERTS,
U. S. Marshal.

By /s/ ARTHUR S. BREMER,
Deputy [15-A]

Territory of Alaska
Office of the Auditor
Juneau

CERTIFICATE

I, Neil F. Moore, Auditor of the Territory of Alaska and ex-officio Insurance Commissioner of said Territory, Do Hereby Certify that I have been served with Writ and Notice of Garnishment, Dean Phillips, Charles Gray and James Kelly, Plaintiffs, vs. Douglas Heay, Defendant, and I hereby accept service of such process. Attached hereto a copy of said Writ and Notice of Garnishment.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal, at Juneau, the Capital, this 30th day of January, A.D. 1951.

[Seal] /s/ NEIL F. MOORE,
Auditor of Alaska, and
Registrar of Vital Statistics.

Receipt of Copy acknowledged.

[Endorsed]: Filed February 5, 1951. [15-B]

[Title of District Court and Cause.]

SUMMONS

The President of the United States of America,
Greeting:

To the Above-Named Defendant—

You are Hereby Required to appear in the District Court for the Territory of Alaska, Fourth

Division, within twenty days after the day of service of this summons upon you, and answer the complaint of the above-named plaintiffs, a copy of which is herewith delivered to you; and unless you so appear and answer, the plaintiffs will take judgment against you as demanded in said complaint, to wit: for the sum of Two Thousand Four Hundred Sixty-four and no/100 Dollars.

Witness, the honorable Harry E. Pratt, Judge of said Court, this 24th day of January in the year of our Lord one thousand nine hundred and fifty-one.

[Seal] /s/ JOHN B. HALL,
Clerk.

By /s/ OLGA T. STEGER,
Deputy Clerk. [16]

Marshal's Return

United States of America,
Territory of Alaska, Fourth Division—ss.

I Hereby Certify, That I received the foregoing Summons on the 24th day of January, 1951, and that I duly served the same on the therein named defendant Douglas Heay at Fairbanks, Alaska, on the 6th day of February, 1951, and by then and there delivering personally to Mrs. Douglas Heay, wife of defendant, at their usual place of abode, a copy of said Summons and a copy of said Com-

plaint, certified to be such copy by the plaintiff's attorney of record.

THEODORE R. McROBERTS,
United States Marshal,
Fourth Division.

By /s/ THEODORE R. LOWELL,
Deputy.

Receipt of copy acknowledged.

[Endorsed]: Filed February 14, 1951. [16-A]

[Title of District Court and Cause.]

MOTION TO DISMISS

Comes now the above-named defendant and moves this Honorable Court to dismiss the complaint on file in the above-entitled cause for the reason that said complaint fails to state a claim upon which relief can be granted to the plaintiff.

/s/ WARREN A. TAYLOR,
Attorney for Defendant.

Receipt of Copy acknowledged.

[Endorsed]: Filed February 26, 1951. [17]

[Title of District Court and Cause.]

NOTICE OF HEARING

To Warren A. Taylor and William V. Boggess,
Counsel for the **Above-Named Defendant.**

You Are Hereby Notified that on the 9th day of March, 1951, at 3:00 p.m., or as soon thereafter as the same can be heard, the issue in the above-entitled cause raised by the defendant's Motion to Dismiss, will be brought on for hearing .

/s/ GEORGE B. McNABB, JR.,
Attorney for Plaintiff.

Receipt of Copy acknowledged.

[Endorsed]: Filed March 3, 1951. [18]

[Title of District Court and Cause.]

ORDER

The plaintiffs were represented by Geo. B. McNabb; the defendant by William V. Boggess.

Mr. Boggess had argument on the defendant's Motion to Dismiss; Mr. McNabb submitted the matter.

It was Ordered that the Motion be granted and the plaintiffs were granted ten (10) days in which to amend the complaint.

Entered March 9, 1951. [19]

[Title of District Court and Cause.]

NOTICE OF SETTING FOR TRIAL

To Warren A. Taylor and William V. Boggess,
Counsel for Defendant.

You are hereby notified that on the 6th day of April, 1951, at the hour of 3:00 o'clock p.m., or as soon thereafter as the same can be heard, the above-entitled cause will be brought on for setting for trial.

Dated this 31st day of March, 1951.

/s/ GEORGE B. McNABB, JR.,
Attorney for Plaintiffs.

Receipt of Copy acknowledged.

[Endorsed]: Filed April 2, 1951. [20]

[Title of District Court and Cause.]

NOTICE OF SETTING FOR TRIAL

To Warren A. Taylor and William V. Boggess,
Counsel for Defendant.

You are hereby notified that on the 13th day of April, 1951, at the hour of 3:00 o'clock p.m., or as soon thereafter as the same can be heard, the above-

entitled cause will be brought on for setting for trial.

Dated this 7th day of April, 1951.

/s/ GEORGE B. McNABB, JR.,
Counsel for Plaintiffs.

[Endorsed]: Filed April 7, 1951. [21]

[Title of District Court and Cause.]

AFFIDAVIT

Joanne R. Bullock, being first duly sworn, on her oath deposes and says:

I did on the 7th day of April, 1951, serve upon Warren A. Taylor a copy of a Notice of Setting for Trial of the above-entitled cause by leaving a copy thereof at the office of the said Warren A. Taylor.

Further Affiant sayeth not.

/s/ JOANNE R. BULLOCK.

Subscribed and Sworn to before me this 10th day of April, 1951.

[Seal] /s/ GEORGE B. McNABB, JR.,
Notary Public in and for the
Territory of Alaska.

My commission expires 4/10/54.

[Endorsed]: Filed April 11, 1951. [22]

[Title of District Court and Cause.]

ORDER

On the Motion of Geo. B. McNabb, Jr., counsel for the plaintiff, Warren A. Taylor, counsel for the defendant being present and consenting thereto, it was Ordered that the trial of this cause be set for 10:00 a.m., Monday, May 7, 1951.

Entered April 13, 1951. [23]

[Title of District Court and Cause.]

CIVIL SUBPENA

To Jess Bachner, 1010 Ninth, Fairbanks, Alaska:

You are Hereby Commanded to appear in the District Court of the United States for the Fourth Division, at the courthouse in the city of Fairbanks, in said District, on the seventh day of May, A.D. 1951, at 10:00 o'clock a.m. of said day, then and there to testify on behalf of the Plaintiffs in a suit pending in said Court wherein Dean Phillips, Charles Gray and James Kelly are Plaintiffs and Douglas Heay is Defendant.

[Seal] /s/ JOHN B. HALL,
Clerk.

By /s/ OLGA T. STEGER,
Deputy Clerk.

Return on Service attached.

[Endorsed]: Filed May 14, 1951. [24]

[Title of District Court and Cause.]

CIVIL SUBPENA

To Douglas Heay:

You are Hereby Commanded to appear in the District Court of the United States for the Fourth Division, at the courthouse in the city of Fairbanks, Alaska in said District, on the 8th day of May, A.D. 1951, at 10 o'clock a.m. of said day, then and there to testify on behalf of the Plaintiffs in a suit pending in said Court wherein Dean Phillips, Charles Gray and James Kelly are Plaintiffs and Douglas Heay is Defendant.

[Seal] /s/ JOHN B. HALL,
Clerk.

By /s/ OLGA T. STEGER,
Deputy Clerk.

Return on Service attached.

[Endorsed]: Filed May 14, 1951. [25]

[Title of District Court and Cause.]

CIVIL SUBPENA

To James Freericks, Weeks Tower, Weeks Field,
Fairbanks, Alaska:

You are Hereby Commanded to appear in the District Court of the United States for the Fourth Division, at the courthouse in the city of Fairbanks,

in said District, on the seventh day of May, A.D. 1951, at 10:00 o'clock a.m. of said day, then and there to testify on behalf of the Plaintiffs in a suit pending in said Court wherein Dean Phillips, Charles Gray and James Kelly are Plaintiffs and Douglas Heay is Defendant.

[Seal] /s/ JOHN B. HALL,
Clerk.

By /s/ OLGA T. STEGER,
Deputy Clerk.

Service of copy attached.

[Endorsed]: Filed May 14, 1951. [26]

[Title of District Court and Cause.]

CIVIL SUBPENA DUCES TECUM

To Floyd James, 312 Fourth, Fairbanks, Alaska :

You are Hereby Commanded to appear in the District Court of the United States for the Fourth Division, at the Courthouse, in the city of Fairbanks, in said District, on the seventh day of May A.D. 1951, at 10:00 o'clock a.m. of said day, and also that you bring with you and produce at the time and place aforesaid all cancelled checks which you have in your possession to the order of Douglas Heay for the purchase of parts for aircraft, then and there to testify on behalf of the Plaintiffs in a suit pending in said Court wherein Dean Phillips,

Charles Gray and James Kelly are Plaintiffs and Douglas Heay is Defendant.

Witness, the Honorable Harry E. Pratt, District Judge of the United States, this 5th day of May, A.D. 1951.

[Seal] /s/ JOHN B. HALL,
Clerk.

By /s/ OLGA T. STEGER,
Deputy Clerk.

Return on Service attached.

[Endorsed]: Filed May 14, 1951. [27]

[Title of District Court and Cause.]

TRIAL BY COURT

The plaintiffs were present and represented by Geo. B. McNabb; the defendant was represented by William V. Boggess.

On the Motion of Mr. McNabb, it was Ordered that the plaintiffs be permitted to file their Second Amended Complaint and, in order for the defendant to prepare his defense to the aforesaid pleading, it was Ordered that the trial of this cause be continued to 10:00 a.m., Tuesday, May 8, 1951.

* * *

Entered May 7, 1951. [28]

[Title of District Court and Cause.]

MOTION TO DISMISS

Comes now the Defendant and moves this Honorable Court to Dismiss the second, further and alternative cause of action contained in Plaintiffs' Second Amended Complaint on file herein upon the grounds that the same does not state a claim upon which relief can be granted to the Plaintiffs; or, in the alternative to

Motion to Strike

strike Plaintiffs' said second cause of action upon the grounds that the same is immaterial, redundant and superfluous.

/s/ WILLIAM V. BOGGESS,
TAYLOR & BOGGESS,
Attorneys for Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed May 8, 1951. [29]

[Title of District Court and Cause.]

ORDER AND TRIAL BY COURT
(Continued)

The plaintiffs were present and represented by Geo. B. McNabb; the defendant was present and represented by William V. Boggess.

Respective counsel had argument on the defendant's Motion to dismiss and motion to strike.

It was Ordered that the Motions be denied.

Mr. Boggess filed the defendant's Answer to the Second Amended Complaint.

Mr. Boggess moved the Court for a continuance of the trial of this cause and presented argument to the Court.

Mr. McNabb presented argument resisting the Motion for a Continuance.

It was Ordered that the Motion for a continuance be denied.

* * *

Plaintiffs Dean Phillips and James Kelly were present and represented by Geo. B. McNabb; the defendant was present and represented by William V. Boggess.

On the Motions of Geo. B. McNabb, it was Ordered that the name of Robert A. Parrish be entered as co-counsel for the plaintiff and that all witnesses, excepting the parties, be excluded from the Court Room except when testifying.

Douglas Heay was duly sworn and testified for the plaintiff.

* * *

Entered May 8, 1951. [30]

Came the parties with their counsels as heretofore and the trial of this cause was resumed.

Douglas Heay, previously sworn, testified further for the plaintiffs.

Dean Phillips was duly sworn and testified in his own behalf.

Floyd James was duly sworn and testified for the plaintiff.

The trial of this cause was continued until 10:00 a.m., Wednesday, May 9, 1951.

* * *

Entered May 8, 1951. [31]

Came the parties as heretofore with their counsels and the trial of this cause was resumed.

Jesse T. Bachner was duly sworn and testified for the plaintiffs.

* * *

Court was recessed to 2:00 p.m.

* * *

2:00 p.m.

Randall K. Acord and Charles James Freericks were duly sworn and testified for the plaintiffs.

The plaintiffs rested.

Douglas Heay, the defendant, having been previously called as a witness by the plaintiffs, was cross-examined by his counsel.

James Freericks, previously sworn, testified for the defendant.

The trial of this Cause was continued until 10:00 a.m., Thursday, May 10, 1951.

* * *

Entered May 9, 1951. [32]

Came the respective counsels as heretofore; came the defendant in person and the trial of this cause was resumed.

Ernest Hubbard and Richard Charles Ragle were duly sworn and testified for the defendant.

The trial of this cause was continued until 2:00 p.m.

* * *

Entered May 10, 1951. [33]

Came the respective counsels and the defendants as heretofore and the trial of this cause was resumed.

Richard Charles Ragle, previously sworn, testified further for the defendant.

Douglas Heay, previously sworn, testified further in his own behalf.

The defendant rested.

Hawley Evans was duly sworn and testified in behalf of the plaintiffs in rebuttal.

Both parties rested.

Mr. McNabb presented the opening argument for the plaintiff; Mr. Boggess presented his argument for the defendant; Mr. McNabb presented his closing argument.

The Court found for the plaintiffs and directed that Findings of Fact and Conclusions of Law and Judgment be drawn accordingly.

* * *

Entered May 10, 1951. [34]

[Title of District Court and Cause.]**FINDINGS OF FACT AND CONCLUSIONS
OF LAW**

This Cause having come on regularly for hearing on the 8th day of May, 1951, and the above-named Plaintiffs being represented by their Counsel, George B. McNabb, Jr., and Robert A. Parrish, and the Defendant being before the Court and being represented by his Counsel, William Boggess, and the Court having heard evidence by both of the parties hereto on the allegations of the Complaint and the Plaintiffs having elected to stand upon the allegations of the Second Cause of Action, and the Court being fully advised in the premises, does hereby enter the following Findings of Fact and Conclusions of Law.

I.

That on September 20, 1950, the Plaintiffs were the owners of a Piper Super Cruiser aircraft, the same having a 115 horsepower engine.

II.

That on or about said day, the Plaintiffs did, at the request of the Defendant, lend to the Defendant said aircraft for the purpose of making a trip to Paxson and Tangle Lakes, Alaska, to transport a mechanic to repair the aircraft previously wrecked by the Defendant in the vicinity of said lakes.

III.

That at approximately 11:00 a.m. at or near Paxson Lake, Alaska, on or about the 20th day of

September, 1950, and while said aircraft was [35] in the exclusive possession and control of the Defendant and while Defendant was operating the same, said aircraft collided with the ground and was totally and completely destroyed, through the negligence of the Defendant in operating said aircraft.

IV.

That the reasonable value of said aircraft is Three Thousand Dollars (\$3,000.00), and that Plaintiffs are entitled to recover as damages the sum of Three Thousand Dollars (\$3,000.00) less the sum of Six Hundred Fifty Dollars (\$650.00), already heretofore paid by said Defendant, the sum of Twenty-Three Hundred Fifty Dollars (\$2,350.00).

From the foregoing Findings of Fact, the Court does hereby make the following Conclusions of Law.

Conclusions of Law

I.

That the said Defendant was negligent in the operation of the aircraft of Plaintiffs at the time heretofore specified.

II.

That Plaintiffs are entitled to recover the sum of Three Thousand Dollars (\$3,000.00) less the sum of Six Hundred Fifty Dollars (\$650.00) heretofore paid, to wit, the sum of Twenty-Three Hundred Fifty Dollars (\$2,350.00) damages.

III.

That Plaintiffs are entitled to recover their reasonable attorneys' fees in the amount of \$435.00, and their costs and disbursements herein to be taxed by the Clerk of this Court, in the amount of \$214.45.

/s/ HARRY E. PRATT,
District Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed May 12, 1951. [36]

In the District Court for the District of Alaska,
Fourth Division

No. 6690

DEAN PHILLIPS, CHARLES GRAY and
JAMES KELLY,

Plaintiffs,

vs.

DOUGLAS HEAY,

Defendant.

JUDGMENT

This Cause having come on regularly for hearing on the 8th day of May, 1951, and the Plaintiffs being represented by their Attorneys, George B. McNabb, Jr., and Robert A. Parrish, and the Defendant being represented by his Attorney, William Boggess, and the Court having heard testimony and evidence by all of the parties hereto, and having

heretofore entered Findings of Fact and Conclusions of Law herein, and the Court being duly advised in the premises:

It Is Hereby Ordered, Adjudged and Decreed that Plaintiffs do have and recover of the Defendant the sum of Twenty-Three Hundred Fifty Dollars (\$2,350.00) together with their reasonable attorneys' fees in the amount of \$435.00, and the costs and disbursements to be assessed by the Clerk of this Court in the amount of \$214.45. That execution issue hereon in ten (10) days.

Now, It Is Hereby Ordered that the Plaintiffs have judgment against the Defendants for interest on said sum at the rate of Six (6%) per cent per annum from date of entry of Judgment.

Dated this 12th day of May, 1951.

/s/ HARRY E. PRATT,
District Judge.

Entered May 11, 1951.

[Endorsed]: Filed May 12, 1951. [37]

[Title of District Court and Cause.]

COST BILL

No. 6690

Marshal's Fees.....	\$ 9.00
Clerk's Fees.....	21.00
Witness Fees: Douglas Heay.....	4.00
Dean Phillips.....	4.00
Jess Bachner.....	4.00
Floyd James.....	8.00
Transportation for Dean Phillips—round trip from Nek Nek.....	164.45
<hr/>	
Total	\$214.45

United States of America,
Territory of Alaska—ss.

George B. McNabb, Jr., being duly sworn, deposes and says: That he is the Attorney for the Plaintiffs in the above-entitled cause, and as such is better informed, relative to the above costs and disbursements than the said Plaintiffs. That the items in the above memorandum contained are correct, to the best of this deponent's knowledge and belief, and that the said disbursements have been necessarily incurred in the said cause.

/s/ GEORGE B. McNABB, JR.,
Attorney for Plaintiffs.

Subscribed and sworn to before me, this 12th day of May, A.D. 1951.

[Seal] /s/ JOHN B. HALL,
Clerk.

Receipt of copy acknowledged.

[Endorsed]: Filed May 12, 1951. [38]

[Title of District Court and Cause.]

OBJECTIONS TO PLAINTIFFS' COST BILL

Comes now the above-named defendant and objects to the following items contained in plaintiffs' Cost Bill on file herein:

“Transportation for Dean Phillips—round trip from Nek Nek—\$164.45.”

for the following reasons:

1. That said item fails to show that said sum of \$164.45 was actually and necessarily paid out for the transportation of said Dean Phillips to attend the trial of this cause, and fails to show that the said sum was actually and necessarily paid out for the transportation of the said Dean Phillips from his usual place of abode and that no receipt showing the payment of said sum is attached to said Cost Bill.

2. That Nek Nek, Alaska, is over 100 miles from the place of trial and that the said Dean Phillips voluntarily attended said trial without being sub-

poenaed as required by Sec. 58-3-7 ACLA 1949 as appears from the records and files herein, and that said item of \$164.45, therefore, was not necessarily incurred.

Dated at Fairbanks, Alaska, this 17th day of May, 1951.

/s/ WILLIAM V. BOGGESS, of
TAYLOR & BOGGESS,
Attorneys for Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed May 17, 1951. [39]

[Title of District Court and Cause.]

**CLERK'S RULING ON OBJECTIONS
TO COST BILL**

Pursuant to Section 55-11-59, Compiled Laws of Alaska Annotated, 1949, the Objection to the Cost Bill in this cause is overruled.

Witness my hand and the seal of this Court this 17th day of May, 1951.

[Seal] /s/ JOHN B. HALL,
Clerk of Court. [40]

[Title of District Court and Cause.]

NOTICE OF APPEAL FROM CLERK'S
RULING ON OBJECTIONS TO COST BILL

Notice is hereby given that the defendant appeals from the Clerk's ruling on the 17th day of May, 1951, overruling defendant's objections to plaintiff's Cost Bill on file herein upon the grounds that the Clerk's ruling was in error as to each of the grounds specified in defendant's objections.

Dated at Fairbanks, Alaska, this 21st day of May, 1951.

/s/ WILLIAM V. BOGGESS,
Attorney for Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed May 21, 1951. [41]

[Title of District Court and Cause.]

MOTION FOR A NEW TRIAL

Comes now the defendant and moves this Honorable Court for a new trial upon the following grounds and for the following reasons:

1. That the Court erred in denying defendant's Motion to Dismiss and, in the alternative, to Strike the second, further and alternative cause of action contained in plaintiff's Second Amended Complaint.

2. That the Court abused its discretion in overruling defendant's motion to continue the trial of said cause for a period of three days made in open Court on the 8th day of May, 1951, one day after the plaintiff's had filed a Second Amended Complaint, and in permitting and ordering the above-entitled cause to go to trial on that date without giving defendant adequate time to prepare his case to meet the Second, Further and Alternative cause of action contained in said Second Amended Complaint.

3. That the Court erred in permitting plaintiffs to change their election to pursue a contractual theory of recovery to a theory of recovery in tort after defendant's final argument.

4. That the evidence was insufficient to justify the findings of fact of the Court in the following particulars:

- (1) As to negligence; and
- (2) As to damages. [42]

5. That the evidence was insufficient to justify the decision of the Court.

Dated at Fairbanks, Alaska, this 22nd day of May, 1951.

/s/ WILLIAM V. BOGGESS,
Attorney for Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed May 22, 1951. [43]

[Title of District Court and Cause.]

MOTION TO SET HEARING

Comes Now the above-named Plaintiffs by their attorneys, George B. McNabb, Jr., and Robert A. Parrish, and respectively move this Honorable Court as follows:

1. For an Order bringing on for hearing the Defendant's Motion for New Trial heretofore filed in the above-entitled cause, at a date not later than the hour of 3:00 p.m., or as soon thereafter as the same may be heard, on Friday, May 25, 1951.

/s/ GEORGE B. McNABB, JR.,

/s/ ROBERT A. PARRISH,
Attorneys for Plaintiffs.

ORDER FOR HEARING

This cause having come on regularly for hearing on motion of Plaintiffs by their attorneys, George B. McNabb, Jr., and Robert A. Parrish, for an order setting on for hearing Defendant's Motion for New Trial, and the Court having [44] been advised in the premises,

It Is Hereby Ordered that said Motion should be heard at the hour of 3:00 p.m. on the 25th day of May, 1951.

It Is Further Ordered That a copy of this Order

and the Plaintiff's Motion be forthwith served upon Defendant's attorney.

.....,
District Judge.

[Endorsed]: Filed May 24, 1951. [45]

[Title of District Court and Cause.]

ORDER

The plaintiffs were represented by Geo. B. McNabb; the defendant by Wm. V. Boggess.

Respective counsel had argument on the objections of the defendant to the Clerk's Ruling on the Cost Bill and the defendant's Motion for a New Trial.

It was Ordered that the Ruling on the Cost Bill of the Clerk be sustained; that the motion for a New Trial be denied.

* * *

Entered June 1, 1951. [46]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Douglas Heay, the above-named defendant, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Order overruling defendant's Motion for New Trial entered in this action on the 1st day of June, 1951, and the final judgment entered in said action on May 12, 1951.

/s/ WILLIAM V. BOGGESS,
Attorney for Appellant,
Douglas Heay.

Receipt of copy acknowledged.

[Endorsed]: Filed June 22, 1951. [47]

[Title of District Court and Cause.]

SUPERSEDEAS BOND

The undersigned as principal has filed notice of appeal to the United States Court of Appeals for the Ninth Circuit to reverse or modify the judgment rendered by the District Court for the District of Alaska, Fourth Division, in the above-entitled cause on May 12, 1951, and to supersede said judgment is required to give an undertaking, under seal, in the sum of Four Thousand Five Hundred (\$4,500.00) Dollars, conditioned for the satisfaction of the judgment in full with costs, interests, and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed,

and to satisfy in full such modification of the judgment and such costs, interest, and damages as the appellate court may adjudge and award.

Wherefore, the undersigned Douglas W. Heay, as principal, and J. M. Stinnett and J. I. Weston, as sureties, appearing and submitting to the jurisdiction of the court, hereby undertake for themselves and each of them, their and each of their heirs, executors, administrators, successors, and assigns to comply with the condition as above set forth, and do further agree that, upon default by the said principal in any of the conditions hereof, the damages and costs, not exceeding the sum aforesaid, may be ascertained in such manner as this court shall direct; that this court may give judgment hereon in favor of any person thereby aggrieved against [48] them for the damages and costs suffered or sustained by such aggrieved party, and that said judgment may be rendered in the above-entitled cause or proceeding against all or any of them whose names are hereto signed.

The said sureties hereon hereby irrevocably appoint the clerk of court as his agent upon whom any papers affecting his liability may be served.

Signed, sealed and delivered this 22nd day of June, 1951.

/s/ DOUGLAS W. HEAY,
Principal.

/s/ J. M. STINNETT,

/s/ J. I. WESTON,
Sureties.

United States of America,
Territory of Alaska—ss.

I, J. M. Stinnett, and I, J. I. Weston, being each duly sworn, say: That I am a surety on the foregoing undertaking; that I am a resident within the Territory of Alaska; that I am not a counselor or attorney at law, marshal, deputy marshal, deputy marshal, commissioner, clerk of any court, or other officer of any court, and that I am worth the sum of Four Thousand Five Hundred (\$4,500.00) Dollars over and above all debts and liabilities and property exempt from execution.

/s/ J. M. STINNETT,

/s/ J. I. WESTON.

Subscribed and Sworn to before me this 22nd day of June, 1951.

[Seal] /s/ WARREN A. TAYLOR,
Notary Public for the
Territory of Alaska.

My commission expires 8/11/51.

Approved on the 22nd day of June, 1951.

/s/ HARRY E. PRATT,
District Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed June 22, 1951. [49]

[Title of District Court and Cause.]

DESIGNATION OF RECORD

To the Clerk of the District Court for the Territory
of Alaska, Fourth Division.

You are hereby requested to prepare, certify and transmit to the Clerk of the United States Court of Appeals for the Ninth Circuit, with reference to the Notice of Appeal heretofore filed by the defendant, Douglas Heay, in the above-entitled cause, the complete record (including this designation) and all the proceedings and evidence in said cause, prepared and transmitted as required by law and by rules of said Court.

/s/ WILLIAM V. BOGGESS,
Attorney for Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed July 2, 1951. [40]

In the District Court for the District of Alaska,
Fourth Judicial Division

No. 6690

DEAN PHILLIPS, CHARLES GRAY, AND
JAMES KELLY,

Plaintiffs,

vs.

DOUGLAS HEAY,

Defendant.

TRANSCRIPT OF PROCEEDINGS

Appearances

GEORGE B. McNABB, JR.,
Of Fairbanks, Alaska,
Attorney for Plaintiffs.

ROBERT A. PARRISH,
Of Fairbanks, Alaska,
Attorney for Plaintiffs.

WILLIAM V. BOGGESS,
Of Fairbanks, Alaska,
Attorney for Defendant.

Be it remembered, that upon the 7th day of May, 1951, at the hour of 10:00 o'clock a.m., the trial of this cause came on regularly for hearing, plaintiffs and defendant represented by counsel, the Honorable Harry E. Pratt, District Judge, presiding:

The Court: This is the time set for the trial of the case of Phillips versus Heay. Counsel ready?

Mr. McNabb: Yes, your Honor. [1*]

Mr. Boggess: Ready, your Honor.

The Court: Very well.

Mr. McNabb: May it please the Court——

The Court: Mr. McNabb.

Mr. McNabb (Continuing): At this time your Honor, with the permission of the Court, I would like to file an amended complaint setting out a separate and alternative cause of action.

Mr. Boggess: Mr. McNabb, I presume you're alleging negligence now, is that correct?

Mr. McNabb: That's correct.

Mr. Boggess: If that's the case, your Honor, then I should like to have this matter continued until such time as I may submit an answer to the plaintiff's amended complaint and prepare myself on the basis of an action in negligence.

The Court: Have you seen the proposed (interrupted).

Mr. Boggess: I have not.

Mr. McNabb: It's just an allegation, your Honor, in the alternative cause of action that the aircraft which was—is the subject of this action was in fact operated in a negligent manner.

Mr. Boggess: I have examined it, your Honor. My request still stands because this will [2] necessitate my getting some expert evidence as to the

* Page numbering appearing at foot of page of original Reporter's Transcript of Record.

reasonable value of this aircraft which would not have been necessary under the first complaint.

(Document handed to court.)

The Court: Well, you're entitled to file an amended complaint, but the defendant is likewise entitled to have time to meet it. So, the present—the second amended complaint may be filed and an order vacating the present setting of the case will be entered.

Mr. McNabb: Your Honor, it would appear to me that at this time it will require us at least a full day to put on our proof in this matter and anything that the defendant has to offer will come thereafter and he will have more than one day in which to seek for and obtain any additional witnesses which he may feel that he needs to present to the Court. In this case, the principal witness of the plaintiff is Mr. Phillips who is employed by the Civil Aeronautics Administration at Naknek and any undue delay in hearing this case would cause him not only embarrassment but if he were required, it will be impossible for him to return for the hearing of this cause because he is the only person who is employed at Naknek or King Salmon, Alaska. I request the court therefore to hear this case not later than tomorrow if that seems reasonable to the court.

Mr. Boggess: If the Court please, [3] counsel is familiar enough with the law of pleadings and did not have to wait until this late date to amend this pleading and catch counsel for the defendant

by surprise. I don't think that one day's extension is adequate time for me to prepare myself, particularly with respect to the cross-examination of the plaintiff's witnesses, the cross-examination changing materially in view of the new theory upon which counsel is proceeding.

The Court: Well, there is a slight difference in the pleading. It seems to me that it involved the same principles originally as it does now. So, I will reset it for hearing tomorrow—for trial tomorrow morning at ten o'clock.

The Clerk: Court is recessed until 1:45 p.m.

(At 10:05 o'clock a.m., the trial of this cause was adjourned until 10:00 o'clock a.m., May 8, 1951.)

Be It Remembered, that upon the 8th day of May, 1951, at the hour of 10:00 o'clock a.m., the trial of this cause was resumed, plaintiffs and defendant being represented in court by counsel, the Honorable Harry E. Pratt, District Judge, presiding:

The Court: This is the time set for [4] trial in the case of Phillips versus Heay. Counsel ready to proceed?

Mr. Boggess: At this time, your Honor, I should like for the court's permission to file a motion to dismiss and in the alternative to strike the second cause of action in plaintiffs' second amended complaint and with the consent of counsel for the plaintiffs, I would be willing to argue that at this time.

The Court: Very well.

Mr. McNabb: If it please the Court, at this time I would like to have Mr. Parrish entered as co-counsel in this matter, your Honor.

The Court: May be so entered. All right, proceed, Mr. Boggess.

(Mr. Boggess presented argument to the court on defendant's motion to dismiss and motion to strike.)

(Mr. McNabb presented argument to the court resisting defendant's motion.)

(Mr. Boggess presented further argument to the court.)

The Court: Well, I'll deny the motion. However, you can raise the same question in your final argument of the case.

Mr. Boggess: At this time, your [5] Honor, with the court's permission, we will serve and file an answer to plaintiffs' second amended complaint.

The Court: Very well.

Mr. Boggess: And subsequent to that time, I should also like with the court's permission to move for a continuance of this matter for the grounds that I will then state.

The Court: You're waiting until after you file your answer?

Mr. Boggess: After I file my answer.

The Court: Very well.

Mr. Boggess: If the Court please, after this matter was adjourned or continued until today, I spent a considerable amount of time yesterday making

inquiry into two propositions. One is the effect of down drafts or vertical air currents on an aircraft in flight which I believe will subsequently be material to this cause and second, making an effort to ascertain the market value or other value of aircraft in order to prepare myself for cross-examination and if necessary to introduce it as part of my case. After the court was adjourned yesterday, I spent the remainder of the morning with my client and a witness for my client in the case inquiring into these matters. In the afternoon, I spent roughly three hours with Professor Ragle at the University of Alaska, inquiring from him of his knowledge of [6] vertical air currents from his experiences in flying in Alaska. After that, I spent my evening drafting the pleadings which I have filed, conversing with my client and making an endeavor to locate another witness. This consumed my time up until about 10 p.m. I have made rough notes and I have had no opportunity to reduce those notes into a workable plan of the presentation of my client's case. In view of the fact, your Honor, that normally in a situation like this where a man files an amended complaint with the permission of the court which necessarily he must first obtain, and in view of the further fact that rule 15 of the Federal Rules of Civil Procedure provides that the defendant shall have 10 days within which to answer such amended complaint unless the court orders otherwise, and in view of the fact that there still remains some work for me to do to reduce my notes and so forth to a proper working order, I

should like to request this court for at least three days' continuance.

Mr. McNabb: If it please the Court, it is not the desire of the plaintiffs in this action to prevent the defendant from having a fair and impartial trial and having his attorney have an opportunity to prepare his case. However, at this time I request the court that we proceed in this matter in that as I stated to the court yesterday, our principal witness must return to Naknek the place of his employment and if this matter is continued for three days at [7] this time, it is for all practical purposes the same as continuing the matter until next November or the next term of court. Now I can suggest this as an alternative method of proceeding. If the court believes that the defendant is entitled to a continuance, I request that we proceed at this time with the plaintiffs' case and then if the defendant desires some additional time before presenting his defense, then I think that we would have no objection certainly to the defendant being allowed any additional time. I am inclined to believe however that this defendant has not been surprised by the turn of events in this case though that is strictly a matter of opinion and perhaps he has been, but we do not believe your Honor that a continuance should be granted and request that it not be granted for the purposes set out.

Mr. Boggess: If the Court please, it is not my fault nor the fault of my client that counsel for the plaintiff has at the last minute submitted a second amended complaint. This action originally was com-

menced your Honor on the 24th of January, 1951. That original complaint contained a defective cause of action on contract. On April 19, 1951, an amended complaint, a first amended complaint was submitted in this matter. That first amended complaint contained a cause of action on a contract. Now, I am sympathetic with plaintiffs' position that this cause may have to be continued until next November because of Mr. Phillips' employment. [8] But where does the responsibility rest for any necessity of continuing this matter until next November? It doesn't rest with us. We weren't responsible for the pleading. We have never made any dilatory—done any dilatory moving in this cause. We recognized the sufficiency in the second cause of action—in the second complaint. We didn't move against that. We moved against the first one only because we had a substantial ground for our motion. Now, if counsel wants to present his case as he suggests and then give me sufficient time to present my case, that misses the point entirely, your Honor. The preparation of my case is important not only in presenting my case but in cross-examining the plaintiffs' witnesses. Therefore, the matter may be adjourned beyond 3 days as far as I am concerned, whenever Mr. Phillips can come back up here to try this cause, but I can't see why I should be forced to go to trial, to the prejudice of my client regardless of my own personal feelings, in this abrupt manner.

The Court: I think the matter presented by the pleadings before the last amendment were such

that the defendant was reasonably apprised of the whole situation and that he is not injured by this recent amendment. The motion will be denied. Proceed with the trial.

Mr. McNabb: May it please the Court——

The Court: Mr. McNabb.

Mr. McNabb (Continuing): Prior [9] to placing or calling our first witness, I should like a ruling by this court as to the law in the matter of one party impeaching a hostile witness of his own. Now, it is my intention to call as our first witness the defendant in this matter, Mr. Heay, and he naturally will be a hostile witness. Prior to the time that I put on other witnesses for the purpose perhaps of impeaching the testimony of my witness, Mr. Heay the defendant, I would like the court's ruling on the propriety of impeaching my own hostile witness.

The Court: There is only one reason that you can't impeach your own witness and that is if you try to show that the witness is so bad—his reputation is so bad that he is unworthy of belief in any condition. Now, you can impeach him in anything else. If he has made different statements or if his statements are untrue, you can impeach him, your own witness, as well as others. As a matter of fact, it is statutory in Alaska but that is the general rule anyway.

Mr. McNabb: It appeared to me, your Honor, that the Alaskan statute might limit the general rule a bit. The general ruling which is set out in section 916 of Wigmore—but I wanted the court's

ruling on that proposition prior to the time I placed this man on the stand.

The Court: Very well.

Mr. Boggess: If the Court please, [10] for the purpose of the record, I'll interpose an objection to this procedure. My objections are rather nebulous but I have them. Under the theory of the pleadings except for the fact of negligence, the witnesses of plaintiffs are sufficiently conversant with what occurred as Mr. Heay and I think some justification should be shown for such an unusual and rather surprising procedure of calling the defendant as the first witness for the plaintiff.

Mr. McNabb: Your Honor, at this time I move we exclude all of the witnesses from the court.

The Court: All right. Witnesses will be excluded from the court room until called to testify. Anybody who is a witness will remain out of the court room until called to testify.

(The witnesses left the court room.)

Mr. Boggess: Would the court give me the benefit of a ruling on that?

The Court: Oh, were you making an objection?

Mr. Boggess: I did.

The Court: Very well, it's overruled. (Pause.) Excepting, of course, parties are not excluded.

Mr. McNabb: Call Mr. Heay. [11]

DOUGLAS HEAY

called as a witness in behalf of Plaintiffs, having been first duly sworn, testified as follows:

Direct Examination

By Mr. McNabb:

Q. Will you state your name, please?

A. Douglas Heay.

Q. Where do you reside, Mr. Heay?

A. 905-5th Avenue, Fairbanks.

Q. What business are you engaged in?

A. I am a bar—partner in a bar.

Q. How long have you resided in Alaska, Mr. Heay?

A. Since, oh, '35 off and on. Not continuously.

Q. Are you the owner of an aircraft?

A. Not at the present time.

Q. Did you ever own an aircraft?

A. Yes, I have.

Q. When did you own that aircraft?

A. I think I bought it in May, of '48.

Q. How long did you have that aircraft?

A. Approximately a year.

Q. Did you sell it? A. Yes, I did.

Q. Are you a pilot?

A. I hold a private license. [12]

Q. How long have you held that license, Mr. Heay?

A. I got it in the fall of '46, I believe.

Q. When did you first start taking instructions as to how to fly an airplane?

(Testimony of Douglas Heay.)

A. Oh, it was in I believe July or August of '46.

Q. And how soon after you first started taking instructions were you granted a license?

A. I would have to check the dates on that. I am not positive. I imagine it was 2 months when I got my private license.

Q. Who issued that license, Mr. Heay?

A. My license was signed by Sparks who was the instructor and the examiner.

Q. And who issued the license?

A. Civil Aeronautics Administration, by virtue of his authority, I imagine.

Q. And have you had a license consecutively since the time that one was originally issued?

A. The license is always good as long as your medical is kept up.

Q. And has your medical been kept up?

A. Yes, it has.

Q. And did—was your license good in November of last year or September of last year?

Mr. Boggess: I will object to the [13] question, your Honor. I don't see its relevancy.

The Court: I couldn't understand you.

Mr. Boggess: I don't see its relevancy, your Honor. It is not within the issues being tried here whether or not this man was a licensed pilot.

The Court: Objection overruled.

Q. (By Mr. McNabb): Was your license good last year on September 20th? A. Yes, it was.

Q. Now, is that license effective now?

A. Yes, it is.

(Testimony of Douglas Heay.)

Q. It is in effect (interrupted).

A. As far as I know.

Q. Well, would you know if it were not in effect now?

A. Well, I imagine that you—from my understanding of Civil Air regulations, in order for—no one can take your license without an examination, without a hearing.

Q. Have you ever been notified that your license was suspended or revoked? A. No, I haven't.

Q. To the best of your knowledge, it is effective as of this date? A. It is as far as I know.

Q. Now, how long—how many hours do you have in single [14] engine aircraft, Mr. Heay?

A. I couldn't tell for sure. I approximate—I figure around 1500. I had log books burn up in the Fairbanks Air Service office and a portion of those hours I checked back when I was taking my commercial test and I also had log books burn when Wein burned up.

Q. But then to your best recollection, you have approximately 1500 hours?

A. Right around that.

Q. Now, you say you have had some commercial instruction? A. Yes, I have.

Q. From whom did you receive that instruction?

A. Well, this same Sparks and also my brother in law, George Richards.

Q. Are both of those people licensed (interrupted). A. Licensed instructors.

Q. For commercial license?

(Testimony of Douglas Heay.)

A. Yes. Al Clam was a licensed ground inspector, meteorology and navigation.

Q. Now, did you have navigation instructions, Mr. Heay? A. Yes, I have, a certain amount.

Q. Is that a normal part of the instruction for a commercial license? A. Yes, it is.

Q. How much navigation instruction did you have? [15]

A. Oh, I would say 25—30 hours.

Q. Did you have meteorology?

A. Yes, I did.

Q. Is that a normal part of the commercial license? A. Yes, it is.

Q. How much meteorology instruction did you have? A. I have only had 5 or 6.

Q. Who gave you that meteorology?

A. This same Al Clam.

Q. Why do you state you had only 5 or 6 hours of meteorology and 30 hours of—25 or 30 hours of navigation?

A. Because I couldn't attend the school at all times. I just happened to catch more navigation than the others. Part of the navigation I have had has been recent. I was figuring altogether with the number of navigation hours I've had.

Q. How many hours in the normal course of navigation, how many hours instruction?

A. For a commercial?

Q. Yes.

A. Oh, I imagine they figure around 30, total.

Q. You think you have had all of the navigation

(Testimony of Douglas Heay.)

instruction which is necessary for procurement of a commercial license?

A. No, I haven't. I am still studying.

Q. Is securing a commercial license dependent upon taking a written examination? [16]

A. Yes, it is.

Q. So, there's no set number of hours which you—which is required for studying, is that correct?

A. No. You have just to pass the test.

Q. Just so long as you can pass the examination?

A. That's right. Some people can do it in 30. It takes me a little longer.

Q. Have you taken an examination in that (interrupted). A. I have—no, I haven't.

Q. Have you taken an examination in meteorology? A. No, I haven't.

Q. How many hours is normally required for meteorology?

A. That I don't know. Twenty to thirty hours I imagine.

Q. You don't need as much meteorology instruction normally as navigation instruction, is that correct? A. I don't know.

Q. Normally that's true, isn't it?

A. That I don't know. I don't know what the average person takes—requires to absorb meteorology or navigation. You have to be able to pass your test.

Q. You put in more time on studying navigation than meteorology? A. Yes, I have.

(Testimony of Douglas Heay.)

Q. Is that—why? Is there any particular reason for that? [17]

A. Well, I was more or less interested in passing my navigation part of my class. Then I would go on to meteorology.

Q. Does it normally require as much instruction in meteorology as it does in navigation?

A. That I don't know.

Q. You stated that you need normally 20 to 30 hours?

A. That's just an estimate. I don't know. A man that is maybe a little faster on the brain could pass it in 10 hours. I don't know. It's mainly just dry study, meteorology. Navigation is a lot of problems to work with.

Q. You found it more interesting studying navigation? A. Yes, I have.

Q. But you have had about 5 hours you say of meteorology?

A. I imagine so. Four or five hours. It has been '46 or '7 since I've had it.

Q. Do you recall the nature of that study of meteorology?

A. Oh, we were starting on fronts.

Q. What do you mean by "fronts"?

A. Well, movements of cold or warm air masses, movements of air itself, different phases, just more or less of going into meteorology as a whole before starting to bite into it.

Q. What did you learn about movements of the air over the ground?

(Testimony of Douglas Heay.)

A. Oh, I don't know. I learned a little, not too much. [18]

Q. Well, what did you learn?

A. Oh, about—(pause)—oh, God, I don't know.

Q. You say you started on how the air moved over the earth?

A. The movement of air as a whole. Air moves from more or less towards the poles and back toward the equator and down to the earth again. We were studying movements of large air masses such as fronts, cold and warm fronts and how to forecast the weather by reading different cloud formations and movements of these same fronts. I can't say I absorbed them all. That's why it's a little difficult for me to describe it.

Q. Well, did you study how the air moves in a particular location?

A. Well, there are ground winds and winds aloft; turbulence due to air movements along the ground or over warm ground or in mountain passes and around mountains, such as that.

Q. Well, how does air move around mountains?

A. Well, I'll tell you. Professor Ragle, he would like to know how air moves around mountains himself and he has been studying it himself.

Q. What is turbulence?

A. Turbulence is more or less vertical movements of air that you could encounter either in open fields or in mountains. As to their exact cause, I don't know.

Q. Is there any—will turbulence normally occur

(Testimony of Douglas Heay.)

any more [19] frequently in one location than in another?

A. Yes, that's been known in Alaska in certain passes or if there is any movement of air at all you find turbulence and there is causes that I don't know. There are windy passes. Isabel Pass which is in the vicinity where I cracked up has been known for a certain amount of turbulence.

Mr. Boggess: Your Honor, at this time I am going to object to any further questioning along this line. Mr. McNabb is particularly interested in vertical air currents and turbulence and fronts and data of that nature. I suggest he get himself an expert witness to testify. There's no showing that this man is a qualified expert. He is merely a private pilot. He's had 6 hours in meteorology. I think there are other people who could better testify.

The Court: You think it is necessary to go into so much detail on that subject?

Mr. McNabb: Your Honor, I would like to know what this man knows about air currents or what he should have known after studying for 6 hours.

The Court: You think this is necessary to your case, do you?

Mr. McNabb: Yes, I do, your Honor.

The Court: Very well. Objection overruled. [20]

Q. (By Mr. McNabb): Now, did you learn in your course of study how air currents move along the surface of the earth?

A. To a certain extent, yes.

(Testimony of Douglas Heay.)

Q. What's the general rule concerning the air movement along the surface of the earth?

A. Well, you have a prevailing wind or a movement of air with fronts and they can be disturbed by running over warm earth in open fields or contours of the earth itself will contort that air and cause turbulence or up drafts or down drafts.

Q. Now, did you—have you learned during your course of study about anything concerning the movement of air currents to conform to the contours of the earth? A. To conform to the contour?

Q. Yes.

A. Movement of air along the ground, I don't think it would conform. It would run into a hill. It would move up a hill and go on up above the hill. It wouldn't necessarily conform I believe. If you get on the lee side of a hill, there possibly could be a down draft but you get on the other side of the hill or more or less fly along it and catch an up draft when you get on the other side.

Q. What would depend or what would determine whether there is going to be an up draft or a down draft?

A. Well, I think the velocity of the wind, the hill itself. [21] There's another factor. Maybe the wind has been split up by going through other passes.

Q. Would the direction of the wind itself have any effect on that?

A. Well, if you're speaking of an area more or less open and there's one or two hills, possibly the

(Testimony of Douglas Heay.)

direction of the wind would. When you're flying in mountain passes, why it's pretty hard to tell from which direction the wind is going and to come from at all times.

Q. Well now, you stated that—well now, I'll ask you this. Is there always an up draft on one side of a hill and down drafts on the other side?

A. Not that I know of.

Q. Well now, you were telling me a moment ago that you might fly along a side here when there would be an up draft on that side and on the other side there would be a down draft.

A. I would say it would—could happen most of the time.

Q. Well then (interrupted).

A. But there is also so many factors that could come in there that you're not—you can't go by it. I mean, if you're going to fly that way, why it wouldn't be a very good policy.

Q. What are the factors then, Mr. Heay, to determine that?

A. Well, that's something with my limited amount of knowledge I don't know all the factors. Like I say, contours, [22] temperature, movement of the general air mass itself and the particular portion of the country you're flying over. I think there's a lot of them there that I don't know quite all about it. Like I say, some of these people are still learning. They're still trying to find out.

Q. Well then, you can't state that you have any

(Testimony of Douglas Heay.)

positive knowledge as to the air currents in and around hills, is that right?

A. No, I wouldn't state that.

Q. Well then, what is the extent of your knowledge of air currents?

Mr. Boggess: I am going to object again, your Honor, to this repetitious hammering at this witness and unnecessarily making a lengthy record. This man has told Mr. McNabb as much as he knows about air currents.

The Court: Objection sustained.

Q. (By Mr. McNabb): Mr. Heay, will we find more turbulence in mountainous area than over flats?

A. That all depends. You can take your open plains of Kansas (interrupted).

Q. Let's confine it to Alaska.

A. Well, you can take over the Tanana Valley. If you have a good hot day and the sun is beating down, you got flats more or less warmed up and you can take off from here and go [23] across the flats and you will find a lot of turbulence there at low altitudes. It would be caused by the air being warmed up by the heat from the trees themselves. I have encountered turbulence across flats before.

Q. That is caused by the warming of the air close to the water, is it?

A. To the ground itself.

Q. Well now, I believe you didn't answer the question though. Can you tell—can you normally

(Testimony of Douglas Heay.)

expect more turbulence and more air movement over mountainous areas than in flat country?

A. I suppose you could.

Q. Now, is it normal to expect then that when you are flying in mountainous country, is it normal to expect up drafts and down drafts?

A. If there is any great air movement, yes.

Q. Well now, what do you mean by "any great air movement"?

A. If there is a flat calm, you can fly through and you don't necessarily have turbulence if there is no air movement.

Q. But then how frequently do you find flat calm in mountainous areas?

A. Well, I wouldn't say too often. It is very seldom.

Q. It is very rare, isn't it?

A. That's right. [24]

Q. So, it's—you can almost say that you normally expect some turbulence in mountain areas?

A. That's right.

Q. And up drafts one place and down drafts another?

A. Right.

Q. And down drafts and up drafts depend upon the movement of the air, that is, the currents of the air flowing in and around those mountains?

A. Well, the direction of the wind, the temperature (interrupted).

Q. But then there is no standard rule is there of what's going to determine where you can expect an up draft or a down draft?

(Testimony of Douglas Heay.)

A. No. Although through a course of flying through some of these passes for several years, I have more or less known where some of the down drafts are. I know if there is any movement of air practically from any direction at Black Rapids you're going to have quite a down draft and a little ways up there is sometimes—sometimes you get a movement.

Q. Well now, where on up the valley?

A. Well, there's a split there where you can go off into the Tangle Lakes. It's where the valley splits and you can go up to Tangle Lakes or on over Summit Lake and on down to Paxson.

Q. And in that particular area, there is normally turbulence, [25] is that right?

A. You will have turbulence in there if there is any air movement.

Q. Well now, tell me, is this second place that you just mentioned over Summit Lake?

A. No, it's going just before you reach Summit Lake, going South.

Q. Which direction? A. South.

Q. Going South? But now, as you go down that pass all the way under normal flying conditions, won't you find that area is turbulent?

A. Well, lots of times you can fly down over a pass and you won't find too much turbulence.

Q. And that is flying at what altitude, Mr. Heay?

A. Oh, anywheres from 3,000 to 5,000 feet.

(Testimony of Douglas Heay.)

Q. Have you ever flown lower than that through the pass?

A. Yes, I have, down through the pass.

Q. What did you find the situation to be at lower altitudes, Mr. Heay?

A. Oh, I have encountered little less turbulence.

Q. Down lower?

A. That's right. I've been dropped—I know at one time I lost 1200 feet coming past Rainbow Mountain and I had this Sparks with me. We was in a Taylor Craft and we encountered [26] some pretty severe turbulence. We lost 1200 feet. When we got down lower, we encountered no more turbulence at all.

Q. What caused you to lose the 1200 feet?

A. Down draft.

Q. Did it drop right out from under you?

A. Just about.

Q. For 1200 feet? A. Yes.

Q. Then she caught and took hold and proceeded? A. That's right.

Q. Mr. Heay, how many times have you flown in and out of Paxson Lake or Paxson Lodge?

A. Paxson Lake and Paxson Lodge are two different places. There's a landing strip at Paxson Lodge.

Q. How many times have you taken off Paxson Lake?

A. That I don't know. I would say at least fifty.

Q. How many times have you taken off the landing strip at Paxson Lodge?

(Testimony of Douglas Heay.)

A. Oh, four, five times.

Q. Do you have any normal course of procedure in taking off from the lake?

A. Usually you take off up wind in a float plane.

Q. Have you found any prevailing wind current in that—at the lake?

A. Any prevailing wind? [27]

Q. Yes. A. No, I wouldn't say so.

Q. One time it will be from the north and another time from the south?

A. That's right, and also I have taken off in one direction from Paxson and landed at Swede Lake which is about a 25 minute round trip and had to land in the other direction coming back into Paxson because there had been a wind shift.

Q. How frequently do these wind shifts occur?

A. That I don't know. I know what I have encountered at times.

Q. Have you ever started to take off in one direction and the wind stopped and you had to take off in another direction? A. Yes, I have.

Q. And fifty times you have taken off from there you found the wind to be variable?

A. Yes.

Q. Exceedingly so?

A. That's right, unless you happen to get up there and there was a 50 mile gale blowing from one direction. It would probably last for seven, eight days which it does and I have tied up the ship and stayed a few days at times.

(Testimony of Douglas Heay.)

Q. Due to the wind?

A. That's right, excessive winds.

Q. Now Mr. Heay, would you say that the Paxson Lake area [28] is one in which there is no normal wind condition?

A. Not to my knowledge. I mean, as many times as I have been out there, I would say maybe I have been in there 3 different days in a row and the wind was blowing in the same direction, but I don't know how you would go around finding out what is the prevailing wind. They built Week's Field out there and if that's built according to prevailing winds, why somebody's hay-wire.

Q. But the point is, you say you have been in and out of there fifty times?

A. Over the course of 3 years.

Q. And the wind as you found it down there (interrupted). A. Is variable.

Q. They are exceedingly variable. One time it happened to change in 20 minutes and you had to come in from another direction?

A. I have had a change in 25 minutes that I know of.

Q. You have testified that in your experience at Paxson Lake, you have attempted to take off in one direction and while so attempting to take off the wind had shifted and you were required to turn and take off in the other direction.

A. That I have done, but that also involves a little time. I don't necessarily say it happens as fast as you say it. By the time you taxi down the

(Testimony of Douglas Heay.)

lake a minute or a minute and a half and decide not to burn your engine up and you can't [29] get off, you might sit there a few minutes or let the engine cool down. When your head temperatures are up and your lube oil temperature is high, you let your engine cool. It is very simple to burn up an engine in a float ship. Or you might put to shore and let—like I did just before I had this crack up and let people out if you were overloaded and this time the wind had also shifted. It doesn't happen just whim bang. It takes a little time but to my knowledge I have known where it has changed 180 degrees in 25 minutes. This particular day I don't—I wasn't keeping track of the time. One day I had made a trip and I knew how long it took me. It took me approximately eleven minutes each way from Paxson Lake to Swede Lake.

Q. And in that length of time how much did the wind change? A. 180 degrees.

Q. Turned clear around?

A. Just shifted altogether.

Q. Is that the same thing that happened on the day of the crash?

A. Yes, to my knowledge it had. I had attempted to take off in one direction and there was a fairly good chop on the lake.

Q. The water was rough?

A. Not rough, just a little chop which did make it nice for a float take off and I couldn't get out. By the time I [30] warmed the ship up and taxied up around the point, the wind had died down a

(Testimony of Douglas Heay.)

great extent and after attempting to take off for approximately a minute, I found I couldn't so I taxied back to Sportsman Lodge and unloaded one passenger and by the time I had gotten back and unloaded the man and I turned the ship around, the wind was blowing from the north then.

Q. Was it choppy then?

A. No, it was not quite choppy. There was a ripple in the water.

Q. How much variance in velocity would you say?

A. That I don't know. I would say it was 15 miles an hour. It had been from the south and it was blowing approximately the same and possibly a little more from the north. I mean, with no—there wasn't too good an indication to give you any indication of the velocity.

Q. That is just basing it on your own judgment?

A. That's right.

Q. How many minutes would you say it required to make that 180 degrees shift on that particular day?

A. Well, that I don't know. I had gone quite a ways down the lake and I took my time taxiing back. We unloaded Ernie Hubbard. I don't know just how long it did take. I would say oh, not less than 20, 25 minutes. I mean, you're not—I lost the wind I had and couldn't get out and I wasn't [31] watching the time so much. We weren't in an enormous hurry.

(Testimony of Douglas Heay.)

Q. How far down the lake did you taxi that day when you tried to take off?

A. Oh, I went quite a ways. I would say little better than a mile, maybe a mile and an eighth or a tenth.

Q. Just little over a mile? It took you three or four minutes?

A. No, it didn't take that long. It shouldn't have.

Q. Did you rev it up and try to take off?

A. Going down that mile?

Q. No, coming back. A. No.

Q. You just lost the wind and didn't even try to get off.

A. No, not with the load I had. The engine warmed up in that run, which a float plane will do, so all I wanted to do is cool the engine down again and unload this passenger.

Q. So you went down the lake and lost the wind and turned around and came back to the lodge, is that right? A. That's right.

Q. That shouldn't have taken more than 4, 5 minutes at the most, should it?

A. Well, I don't know. It takes a little longer sometimes.

Q. Well, would you say it took 15 minutes to go down and turn around and come back an (interrupted). A. Possibly so. [32]

Q. (Continuing): —let your passenger out and then took off?

A. Probably took me 15 minutes to get back to

(Testimony of Douglas Heay.)

the Sportsman Lodge and I let the passenger out and turned the ship around and pulled out passed the point and had to—I had the wind from the north in the meantime.

Q. You have any difficulty getting off that time?

A. No.

Q. Was there any wind blowing then? You say it had changed?

A. There was a wind from the north, yes.

Q. You took off into the north? A. Yes.

Q. Now, what day was this, Mr. Heay?

A. I don't remember the exact date. It was in September. I think it was (interrupted).

Q. Well, it is alleged in the complaint that this crash took place on the 20th day of September.

A. It was the last day of moose season. Yeah, it was.

Q. Last day?

A. Last day. That's what I was trying to figure from.

Q. Do you recall what time it was when you took off down there?

A. Well, it was around 9 or 9:30 in the morning, I believe.

Q. And who was with you on that trip?

A. Jess Bachner. [33]

Q. Are you personally acquainted with Mr. Bachner? A. Yes.

Q. What is his occupation, do you know?

A. He works at Fairbanks Air Service. I believe he's a part owner or a full owner. I don't

(Testimony of Douglas Heay.)

know his status out there. I know Jess has been running it more or less. I think he owns it.

Q. Is he a pilot?

A. Well, yes. He has a private license. He is at least that. Maybe he is a commercial pilot. I don't know.

Q. Now then, Mr. Heay, you had flown this particular airplane from Fairbanks to Paxson?

A. Yes, I had.

Q. Did you go anyplace else?

A. Yes, we went over to the small lake just off the McLearn River and we landed at Paxson and stayed overnight and it was next morning that this accident happened.

Q. Now on what day did you receive this airplane from the owner?

A. It must have been the 19th.

Q. Where did you take it off from?

A. Chena Slough.

Q. And you flew directly where?

A. Right through this—I don't know whether we landed at Paxson first or not. I think we went back to this small [34] lake and then back to Paxson. I wanted to show Ernie Hubbard the Cessna that was up there.

Q. Whose airplane was that?

A. Malloy's. F. Malloy. I don't know his first name.

Q. And then you landed that evening at Paxson Lake? A. Yes.

Q. You stayed all night? A. Yes.

(Testimony of Douglas Heay.)

Q. And the next morning then you started to take off in one direction, the wind shifted and you wanted to drop a passenger? A. Yes.

Q. Who was with you?

A. Jess Bachner and Ernie Hubbard.

Q. And which one of those men did you let out of the plane? A. Ernie Hubbard.

Q. Then how far did you taxi then to get off?

A. Well, we made a normal take off run then. I would say about 50—oh, now wait—(pause)—I don't know, 40 seconds, 45 seconds.

Q. Were you loaded heavy?

A. No. Jess Bachner and myself and I believe we had one full tank of gas and the other tank was one-quarter full.

Q. How much gear did you have? [35]

A. We had one small box with some rivets and some tools of Jess Bachner's and his rifle and a pair of cover-alls.

Q. How much gear do you suppose—what was the weight of the gear that you had?

A. Oh, I don't believe counting the rifle and all it was 25 pounds.

Q. How much do you weigh (interrupted).

A. I weigh (interrupted).

Q. (Continuing): —or how much did you weigh at that time?

A. I weighed about 185 then.

Q. Do you know how much Mr. Bachner weighed at that time or approximately how much?

(Testimony of Douglas Heay.)

A. No, I don't. Somebody mentioned yesterday he weighed 230 or 244 pounds.

Q. Pretty chubby, huh?

A. Well, he's built pretty close to the ground. He is husky.

Q. How much did the gas weigh that you had in there?

A. Well, the 18 gallons in the one tank, I would say around 225 pounds.

Q. Do you know what the load limit of that plane was with that amount of gasoline?

A. No, I don't but I felt that I was well under the load limit. [36]

Q. Did you have any trouble getting off?

A. The second time, no.

Mr. McNabb: Can we have a 10 minute recess at this time, your Honor?

The Court: Yes, we'll take a 10-minute recess.

Clerk of the Court: Court is recessed for 10 minutes.

(At this time, a short recess was taken and the trial of this case was thereafter resumed.)

The Court: Counsel ready to proceed with the trial of this case?

Mr. McNabb: Ready, your Honor.

The Court: Very well.

Q. (By Mr. McNabb): Now, how far did you have to taxi before you got the plane up on the step that day, do you recall? A. No, I don't.

(Testimony of Douglas Heay.)

Q. Do you recall how far you had to taxi to get it airborne?

A. Offhand, I had got her on the step and was in the air.

Q. Did you have any difficulty getting it off?

A. Not the second time I don't believe. I don't recall any difficulty.

Q. Now, what did you do when you got the airplane in the [37] air?

A. Turned and went south down the lake and made another turn and came back north to get altitude.

Mr. McNabb: Mr. Clark, what has become of the big blackboard we had?

Clerk of the Court: It is right over yonder. Oh, the blackboard? Oh, it's in the other room. It's not here.

(At this time, the Clerk of the Court left the courtroom and returned with the blackboard.)

Mr. McNabb: Where is the most advantageous place to put it?

Mr. Parrish: I think there in front of the pitcher would be all right, George. Is there any special place you want the board to see?

The Court: Well, that's all right where it is. Mr. Boggess can come over there too so he can see it.

Q. (By Mr. McNabb): Now, Mr. Heay, will you describe for—come down here and draw us a diagram, please, of that lake.

A. I am not a very good artist.

(Testimony of Douglas Heay.)

Q. You better make this north, now.

A. This is more or less the north end of the lake. It's 12 miles long. [38]

Mr. Parrish: Put it as heavy as you can so the court can see it.

The Witness: This is the north end of the lake.

Mr. Boggess: Your Honor, would it be possible to put a large sheet of paper there? If you're going to have this testimony graphically illustrated, you would have something to preserve.

The Witness: I can make an illustration.

The Court: I think your suggestion is a good one because you can't put a blackboard in evidence.

Mr. Boggess: That's correct.

The Court: It would be better to have it on a piece of paper.

Mr. McNabb: Well (interrupted).

The Witness: We can leave it there and I will re-copy it.

Mr. Boggess: I am rather interested in having this matter down myself because it will be of assistance to me later on in my case and I have no objection except to preserve it.

Mr. McNabb: Your Honor, may I suggest we go ahead on the blackboard and then we can have Mr. Heay trace it and have some other person trace it, this same map or another one. [39]

Mr. Boggess: I don't have any objection to that.

Mr. McNabb: As long as we get a diagram of what occurred.

The Court: Very well.

(Testimony of Douglas Heay.)

The Witness: I don't know just exactly the outline of that lake. It is 12 miles long. It makes a curve in there. This is Sportsman Lodge.

Q. (By Mr. McNabb): Would you put the highway on please?

A. This little stream, it comes close to the highway. This would be Sportsman Lodge and I attempted to take off south, couldn't do it, dropped my passenger to Sportsman, dropped him off and swung out here and took off to the north.

Mr. Boggess: At this time, I would like to suggest that you make directions in one corner of that map and indicate north and south.

Mr. McNabb: Well, he has. He's got north up above.

Mr. Boggess: Has he?

The Witness: Your question was what did I do after I took off.

Q. (By Mr. McNabb): Well, if you will please place on that map in reference to the lake your exact pattern. [40]

A. Here's my take off. I swung up here south again and we built up altitude and then swung over here and gained altitude and we came across here. This is where I hit the down draft below this mountain. I was attempting to cross the saddle here or whatever you want to call it.

Q. I believe there is another peak on there.

A. There is a hump of some kind. You mean down in here? It sits back further actually and there is in fact just below it, there's a small canyon

(Testimony of Douglas Heay.)

that runs in there, if you are acquainted with that area—right in there—and below this hill is where I caught the down draft. I was going towards the ridge at an angle more or less of southwest.

Q. Uh-huh.

A. I found myself in a down draft and turned back to the lake with the nose down and still at full throttle and climbing throttle at all times here after take off and that is when I hit the ground in here approximately.

Q. Now, let me review your testimony. You started—when you began your take off, you started in a northerly direction?

A. Yes.

Q. Off the lake?

A. Off the lake.

Q. And as soon as you became airborne, you made a 180 degree right turn? [41]

A. Left turn—not as soon as I became airborne. I took off from this point and went up beyond the fringe of the lake here.

Q. You got beyond the fringe of the lake, over the shore then?

A. I gained altitude before I made my first turn.

Q. Well now, how much throttle did you have?

A. Full throttle, take off throttle which I was advised to use, and high pitch.

Q. And how fast were you climbing?

A. That I don't know. I wasn't watching the air speed indicator too closely.

Q. What was the angle of incline, that is, how many feet per minute were you climbing?

A. At that time? Oh, I would say two, three

(Testimony of Douglas Heay.)

hundred feet a minute. I believe—all I know is the feel of the airplane.

Q. You made a 180 degree turn to the left?

A. Yes.

Q. And came back and down over the lake again?

A. That's right, down along here, going south.

Q. How far did you fly south?

A. Oh, I would say $2\frac{1}{2}$ or 3 miles.

Q. And then you made another 180 degree turn to the left, is that right? [42] A. Yes.

Q. And you flew—did you cross over the highway?

A. Well, I don't remember. I doubt if I did. That's quite a wide lake. I don't show it here. In fact, over right by here there's hills along in there so I was staying clear of those.

Q. So you flew the second time approximately the same course so far as the turn is concerned as the first time?

A. Well, I turned a little bit short.

Q. You turned shorter? A. Yes.

Q. Now, what was the purpose of making that circle?

A. Well, I had by going out and coming back down and coming around, I figured that I had gained sufficient altitude so I can make my turn a little bit shorter and get across that ridge.

Q. How high were you over the lake?

A. I would say just about a thousand feet.

Q. Over the lake?

(Testimony of Douglas Heay.)

A. Over the lake itself. The elevation of that lake I think is 2500.

Q. Now then, as you took off and as you were flying that plane, was the motor operating properly?

A. Yes, it was.

Q. Did it continue to operate properly as you made that [43] turn?

A. Yes, it did. I never noticed any engine failure or what you might call engine failure in any way on the aircraft.

Q. Well now, did it respond to the controls? Did the controls respond properly as you made your turn? A. Yes, they did.

Q. And had the motor operated properly when you flew the plane from Fairbanks to Paxson?

A. Yes.

Q. And had the controls operated properly during that time? A. Yes.

Q. And the plane was always responding to those commands, had it?

A. Yes, it did. There is no defect in the engine or the aircraft so far as I know.

Q. Now then, you turned—made a second 180 degree turn and what direction roughly did you approach that hill?

A. Well, I would say a southwesterly direction. If this were true north here (indicating) I would be more or less (indicating).

Mr. McNabb: Your Honor, perhaps we can replace the diagram with this—with these maps.

(Testimony of Douglas Heay.)

The Court: Very well.

Mr. McNabb: Don't erase it though. [44]

The Witness: No, I wasn't.

The Court: I think we better use this board over here for the maps.

Q. (By Mr. McNabb): Now, do you know, Mr. Heay, what this "X" at the "B M" represents?

A. No, I don't.

Q. Well, is that "X" at the approximate location of the Sportsman's Lodge?

A. It looks—it's just about it. Sportsman's Lodge is on a little point out there.

Q. Now, what is the elevation of the Gulkana Lake or as we call it, Paxson Lake?

A. I believe it's 2500 feet.

Q. Is this figure here, 2579 feet, do you know what that is supposed to represent?

A. Approximately—possibly the elevation. I am not familiar with this type of chart.

Q. On your diagram on the blackboard, can you indicate to us the peaks of the hills as shown on this map?

A. The peaks of this one I attempted to do. Whether I succeeded or not, I don't know.

Q. Now—we will mark this peak "X." Is that the hill which is marked as 5280 feet elevation?

A. That's the one I attempted to put on the blackboard. [45]

Q. That's "X."

A. I attempted to mark that mountain on the

(Testimony of Douglas Heay.)

blackboard. Then I attempted to show what I call the saddle coming in there.

Q. Now Mr. Heay, I will ask you to mark on this map with an "S" where the saddle is?

The Court: Do you have any colored pencils, Dixie?

The Witness: That would be right in here.

Q. (By Mr. McNabb): Put an "S" in there.

A. In other words, you got a high peak there and another one in there and looking at it from eye level it looks like a saddle.

Q. Now, where is the second high peak?

A. This is the high peak near the lake.

Q. That's "X"?

A. Yes, and this is the little hill on top.

Q. Well, mark—you have marked the high peak with an "X."

A. You marked it. I marked the saddle.

Q. Now, mark the second high peak with another "X." Make it a double "X." Mark the second high peak.

A. On the lake?

Q. Well, in your previous testimony you said there is one [46] high peak which we have designated and then another second high peak.

A. Not a high peak. There's another one here though.

Q. That's it.

Mr. Parrish: How was that one marked?

The Witness: Double "X."

Mr. McNabb: Double "X."

Q. (By Mr. McNabb): Now then, if I under-

(Testimony of Douglas Heay.)

stand your testimony correctly Mr. Heay, you took off from Gulkana Lake or Paxson Lake in a northerly direction? A. Yes.

Q. Made one 180 degree turn (interrupted).

A. To the left.

Q. To the left, and came then south (interrupted).

A. Yes, but not over here. We are still over the lake.

Q. Following the lake? A. That's right.

Q. Then you made a second 180 degree turn?

A. Right.

Q. Going again northward in the same direction in which you took off? A. That's right.

Q. Then you made a 90 degree turn to the left or more?

A. Little better than 90. A 120. [47]

Q. And approached these hills (interrupted).

A. At an angle, heading for this saddle.

Q. Now then, will you draw on that map—not necessarily staying on the lake because that's going to make us a little close (interrupted).

A. The same take off like I did on the board?

Q. Yes.

The Clerk: Here's a red and blue and green pencil (handing to Mr. McNabb).

Mr. McNabb: I would be glad to accept a gift from you.

The Witness: Here's what I done.

Mr. McNabb: The witness is tracing on the map an illustration of his flight in a red pencil.

(Testimony of Douglas Heay.)

Q. (By Mr. McNabb): Now then (interrupted).

A. I'm too far over here now.

Q. You were approaching the hills in a generally southwesterly direction, is that correct?

A. Yes, if I had the lake as laying in my mind north and south.

Q. Now, can you mark on here with a blue pencil the approximate place where you struck the hill?

The Court: What is the scale of that map, Mr. McNabb? [48]

Mr. McNabb: One inch to five miles, your Honor—no, that's wrong. One and a quarter inches to five miles, your Honor.

The Court: All right.

Mr. Parrish: Can we designate that point with some letter?

Q. (By Mr. McNabb): This is the place of your crash? A. Approximately.

Q. Will you mark that with a "C" for crash? Now then, Mr. Heay, you approached these hills having left the lake at a generally southwesterly direction? A. Right.

Q. And were you climbing at that time?

A. I was still in a climbing attitude and still climbing also.

Q. And do you know how rapidly you were climbing?

A. No, I don't. All I know is that according to my knowledge, I was climbing at a speed—well, I was climbing and going at enough rate of speed that with the distance I had left to go to reach the

(Testimony of Douglas Heay.)

saddle, I would have plenty of clearance by the time I reached the saddle.

Q. But you don't know how rapidly you were climbing? A. No, I don't.

Q. Did you know at the time?

A. No. [49]

Q. Was there an instrument in that aircraft which indicated the rate of climb?

A. I don't believe there was. I am not sure now.

Q. Did you look at any instrument which was in the airplane to determine how rapidly you were climbing?

A. No. I looked at the air speed indicator a time or two.

Q. What did the air speed indicator say? What was the reading of the air speed indicator?

A. Well, the reading—I think it was around 70, right pretty close to 70 indicated.

Q. And in reference to the time of the crash, when did you look at that air speed indicator?

A. That I couldn't swear to. I was a little bit busy about that time.

Q. Well, was it just fairly shortly prior to the time when the plane crashed or was it when you went out over the lake?

A. That I can't swear to. I don't—you don't just keep track of things like that. Just like you know the last time you look at the speedometer of your car you're driving and you look at it and you don't pay too much attention to it or whatever it

(Testimony of Douglas Heay.)

reads unless it reads wrong. Then you do something about it.

Q. The last time you looked at you air speed indicator, it was reading 70 miles an hour or so? [50]

A. If I remember rightly, it read 70 and the airplane felt fine.

Q. And it was responding and doing everything properly, is that right? A. That's right.

Q. And flying properly?

A. Yes, it was, as far as I know.

Q. Now then, as you approached those hills, you say had you continued to climb you would have had enough altitude to get over the saddle?

A. That's right. At the altitude I was in or the ship was in and my rate of climb and my distance from the saddle, barring the down draft I ran into, I would have had sufficient altitude and been in a safe position—I would have had proper altitude and—I don't know how to say it, but I would have been in the position I wanted to be in at any rate.

Q. That is, if the plane had continued to climb at the rate of 70 miles an hour, by the time you reached the saddle you would have had enough altitude? A. That's right.

Q. Does that map indicate the height of the mountain which we have designated as "X"?

A. Yes, 200 foot graduation.

Q. Will you tell us what that is please?

A. Oh, 5,280 feet. [51]

Q. It isn't 5,500 feet?

(Testimony of Douglas Heay.)

A. I said 5 thousand.

Q. 5,280? A. Right.

Q. Does it indicate the height of the mountain which we have marked double "X"?

A. Just a minute. Let me figure this. Don't write this down. Starting at the lake the only elevation I have is 2979 and it has here a 200 foot graduation and (pause) two, four six, eight—two, four, six, eight—according to this, it would be 3,579 feet, the one marked double "X."

Q. That's the mountain—the hump?

A. The double "X," yeah.

Q. How high is that saddle?

A. Well, it's one graduation less. It is 200 feet less.

Q. Now, is that the same as is indicated on this map?

A. This doesn't have any elevations I believe. The graduations go by colors and it shows over 5,000 feet.

Q. Just shows over 5,000 feet? Now Mr. Heay, as you recall, how much elevation did you have over the lake as you made your second turn or you approached—your approach to the hill?

A. I figured pretty close to a thousand feet, pretty near 3,500 feet.

Q. Well then what is the elevation which this map [52] discloses to be the elevation of that saddle?

A. What was it now? 3400 wasn't it, or 3300?

(Testimony of Douglas Heay.)

Q. 3379, isn't it?

A. Oh, yeah, reading for—reading from this. Yeah, 3379 feet.

Q. So, it is 800 feet higher than the lake?

A. Well, I would say so.

Q. Now that of course is at the low part of that saddle, isn't that right, Mr. Heay?

A. That's right. I hadn't reached there as yet.

Q. And you weren't approaching that low part perpendicularly to it, were you?

A. What do you mean, straight at it?

Q. Yeah. A. I was angling towards it.

Mr. McNabb: Mark this.

The Clerk: Plaintiffs' identification number one.

(At this time, a photograph was marked for identification as Plaintiff's Identification 1.)

Q. (By Mr. McNabb): Now Mr. Heay, I will show you plaintiffs' identification number one and ask you if you know what that is.

Mr. Boggess: May I examine that identification first, your Honor? [53]

The Court: Yes. We will use that policy all the way through. Show the other attorney first (interrupted).

Mr. McNabb: Very well, your Honor.

The Court (Continuing): Before the witness.

Q. (By Mr. McNabb): Now, do you know what that is?

A. It looks like the peak at the north end of the lake.

(Testimony of Douglas Heay.)

Q. Wait a minute. What is it?

A. I say it looks like the peak to the north end of the lake.

Q. Isn't that a photograph?

A. Yes, it's a photograph.

Q. Do you know what it is a photograph of?

A. Well, some water and a hill.

Q. Now, does that appear to you to be a photograph taken across Paxson Lake and toward the high peak which is represented on this map with an "X"?

A. Yes, it looks like it to me. I don't know—I don't know whether it looks like it was taken from Sportsman or not.

Q. No. I just said if it appears to be taken across the lake.

A. Taken at an angle, yes.

Q. Now Mr. Heay, you will observe on that map an ink spot. [54] Do you see it?

A. Uh-huh.

Q. Now, does that correctly represent the approximate location of the crash in reference to the peak?

A. I would say it looks pretty close to it. I have never seen the crash.

Q. You mean you have never returned to the scene of the crash?

A. I have been to the general location. In fact, I was there last week but I have never been to that crash.

Q. But you were there when it took place?

A. I think so. I didn't hear it hit if you want to know the truth.

(Testimony of Douglas Heay.)

Mr. McNabb: Your Honor, I will move to introduce this photograph into evidence at this time.

Mr. Boggess: I have no objection, your Honor.

The Court: May be admitted.

The Clerk: Plaintiffs' Exhibit "A."

(At this time, the photograph marked as Plaintiffs' Identification No. 1 was offered into evidence and marked as Plaintiffs' Exhibit "A.")

Q. (By Mr. McNabb): Now Mr. Heay, if that ink dot on the photograph [55] represents the approximate location of the crash, where is the saddle?

A. Right back over in here.

Q. Well now, as we view this photograph, which direction from the approximate location of the crash is that saddle?

A. It would be—this way is north. It would be just about west over there. This looks like it is running that way. It's coming down the lake actually and this hill looks higher because it is closer and I was back up in here flying southwesterly. In other words, by the time I got to the ridge, I would have had plenty of altitude. I made a 180 degrees—not quite a 180 degrees—I made my turn to get out of this draft which was evidently spilling down on the back side of this mountain and attempted to reach the lake again and dived at it in a diving attitude, nose low and full throttle, recovery altitude you might say and I couldn't reach it.

(Testimony of Douglas Heay.)

Q. Now, the saddle is to the left of this ink spot which represents the crash?

A. The left is—in that picture, yes.

Q. Now, how far to the left of that ink spot is the crash location, a mile or two miles?

A. Yes, it is that, I would think. The angle that this picture is taken (interrupted).

Q. Would you say it is two miles?

A. I couldn't swear. I can't tell from this. [56]

Q. Well now, looking at the map here from the spot on which you have designated the crash down to the saddle represents approximately one-half an inch.

A. That would be about 2 miles.

Q. Approximately 2 miles?

A. It would represent about 2 miles—five miles to the inch and a quarter.

Q. So you were not approaching that saddle straight on toward it. You were angling towards it?

A. That's right. I had gone up the lake and was coming back, angling back towards it and we started in here some place.

Q. Now then, how much elevation over the lake did you have when you left the boundary of the lake, left the water?

A. Starting back toward the ridge?

Q. Yes.

A. I figure pretty near a thousand feet.

Q. But you were still climbing?

A. That's right.

Q. How much elevation do you think is proper—a proper amount of elevation to safely cross that saddle or any hill as far as that's concerned?

(Testimony of Douglas Heay.)

A. Usually all you can get, but to safely cross it with shifting winds, you shouldn't have less than 500 feet I should imagine. [57]

Q. You say with shifting winds. Were the winds shifting up there?

A. I didn't know it at the time. They had just previously shifted before I took off.

Q. Would you say then with the knowledge that the wind had previously shifted that put you on notice for additional shifting winds aloft?

A. Not the way you have it worded, no. It didn't put me on, oh, on guard you might say because that wasn't an excessive wind for that country. In other words, it was normal flying for Paxson Lake, as far as I was concerned.

Q. What? You mean shifting winds are normal for Paxson? A. For what?

Q. For the Paxson vicinity, shifting winds are normal? A. Well, yes.

Q. You had approximately thousand feet of altitude as you left the lake and approached the hill?

A. Estimated.

Q. A thousand feet over the water that is?

A. That's right.

Q. And you were continuing to climb?

A. Yes.

Q. How were you continuing to climb, at full throttle? A. Yes, I was.

Q. But can you estimate the rate of climb of that airplane? [58]

A. The higher your altitude, the less your rate

(Testimony of Douglas Heay.)

of climb is going to be. It is pretty hard for me to estimate. I just know the attitude I was approaching to me was sufficient to clear going over with lots of clearance and as far as estimating how many feet per minute, I couldn't pin it down.

Q. You say that you—as you approached that hill, you struck a downdraft?

A. I found myself in one. I think it struck me first.

Q. The plane was in a downdraft?

A. The plane first started to settle for no reason in the world. In other words, my horizon was changing much to my sorrow so I realized I was in a downdraft so I made every attempt to get out of it.

Q. How close to that hill were you when you struck that downdraft?

A. I would say I was better than half way up to the saddle.

Q. Well I know, but I mean, you were flying at least partially parallel to the peak of the hill, weren't you? You were approaching it in a south-westerly direction.

A. At an angle, yes. I was over the hill or part of the hill. It was graduating.

Q. How far from that hill were you when you hit that downdraft?

A. You mean how far from the peak?

Q. No, from the hill. You were flying along in a general [59] direction slightly parallel to that hill.

(Testimony of Douglas Heay.)

How far from that hill were you when you hit the downdraft? A. I was over part of it.

Q. I know, but we are talking about altitude. How high over the ground were you when you hit the downdraft?

A. Well, I would say—oh, I don't know. That I can't say. I just don't (interrupted).

Q. Well, were you 300 feet?

A. Oh, I was better than 300 feet.

Q. Four hundred feet?

A. I would say 500 feet at least.

Q. Uh-huh. That is 500 feet altitude.

A. Flying into it at an angle.

Q. At that angle, how far were you from that hill as it sloped down underneath you there?

A. I would say 500 feet.

Q. Five hundred feet from the ground and 500 feet from the hill?

A. Oh, no. I was more than 500 feet out. I would say I was a thousand feet out.

Q. A thousand feet out and 500 feet from the ground?

A. Five hundred feet vertically and a thousand feet horizontally.

Mr. McNabb: That's all I want. Shall we take a recess for lunch?

The Court: Yes. [60]

(At 12:00 o'clock noon, the trial of this cause was recessed until 2:00 o'clock p.m.)

(At 2:00 o'clock p.m., the trial of this cause was resumed.)

The Court: Counsel ready to proceed with the trial of Phillips versus Heay?

Mr. McNabb: Plaintiffs are ready, your Honor.

Mr. Boggess: Defendant is ready, your Honor.

The Court: Very well. I think you're on the stand, Mr. Heay.

(Mr. Douglas Heay resumed the witness stand.)

Direct Examination

(Continued)

By Mr. McNabb:

Q. Now, I believe we have the position of the airplane, 500 feet above the ground and 1,000 feet from the hill at the time you hit the downdraft, is that correct? A. As close as I know.

Q. Now then, when you hit that downdraft, what happened to the airplane?

A. The airplane started to settle. I noticed from my horizon I was losing altitude while I was still in a climbing [61] attitude.

Q. Now in reference to the horizon, the airplane though losing altitude, was nose high, is that correct? A. It wasn't until I corrected it.

Q. The minute you hit the downdraft, the nose was high, is that right?

A. Yes, in a climbing attitude.

Q. Then you hit the downdraft? A. Yes.

Q. And the plane began to settle in that same position, is that correct? A. Yes.

(Testimony of Douglas Heay.)

Q. Now then, what did you do?

A. Well, I recovered, dropped the nose down and made my turn back towards the lake and kept the nose down attempting to gain air speed and gain control and get back to the lake.

Q. Now tell me, you say you recovered. What do you mean by the word "recovered"?

A. Well, recover from its attitude of settling or to keep it from stalling is what it amounts to.

Q. Well, what did you—you say you had recovered?

A. Well, evidently I didn't completely or I wouldn't have cracked up. I attempted to recover.

Q. You attempted to recover and in attempting to recover you made a turn? [62]

A. I lowered the nose and made a turn here and put the nose down at full throttle.

Q. Which direction did you turn?

A. I turned, I believe, it was to the left back towards the lake.

Q. And how much of a turn was that?

A. Oh, possibly 90—pretty near 90 degrees. I was heading toward the hill at a 45 degree angle. It would be say 70 or 80 degrees.

Q. Well now, would you look at the map? Is this your general line of flight as marked in blue pencil?

A. Yes, angling at—towards this saddle at approximately 45 degrees.

Q. Well now, we will assume that—(pause)—your Honor, for the purpose of determining as

(Testimony of Douglas Heay.)

accurately as possible the precise angle at which Mr. Heay approached this range of hills, I am going to draw on the map a straight line from the peak which is marked "X" to the peak which is marked double "X" in ink. Now, in blue—in reference to this line which is from peak to peak, the blue line indicating your flight represents the angle at which you were approaching the hill, is that correct?

A. That's correct.

Q. Then as it is shown here, it is approximately a 45 degree angle, is that correct? [63]

A. About that, yes.

Q. Now you hit the downdraft and you turned then and as it is indicated here Mr. Heay, that was for all practical purposes a 180 degree turn to the left.

A. That's the way I marked it.

Q. Is that true and correct as you recall it?

A. Well, I don't believe I turned quite that far. What I done here when I started, I was off and—I tried to adjust my first marking there.

Q. From the red pencil to the blue?

A. Yes, and then when I made my turn here in blue (interrupted).

Q. Do you want to readjust that further?

A. Well (interrupted).

Q. Perhaps you didn't get clear down here before you hit the ground?

A. How far up the mountain I had actually hit I don't know.

Q. You have shown here a 180 degree turn.

A. I don't believe it was that much. It's hard

(Testimony of Douglas Heay.)

telling. I turned so I was more or less (interrupted).

Q. Heading toward the lake?

A. Toward the lake.

Q. So then, we will assume you're back here then?

A. Approximately. I don't know for sure.

Q. Yeah. Well now, we will mark that "C" "2," how's that? [64]

A. Correction?

Q. Yeah. Is it then your opinion, Mr. Heay, that the circle marked here as "C 2" perhaps more clearly—more correctly indicates the position of the airplane where you struck the ground?

A. Yes, to my knowledge.

Q. Okay. Now, you attempted to recover. Initially you stated "I recovered" and turned and got the nose down. Now you think that you turned and got the nose of that plane down and attempted to recover.

A. That's right, only it was getting the nose down and then the turn.

Q. You didn't—you got the nose of the plane down before you made your turn, is that correct?

A. Yes.

Q. And you headed back (interrupted).

A. Towards the lake.

Q. Towards the lake. Now, did you cut the throttle?

A. No.

Q. Did you have full throttle?

A. Yes, I did.

(Testimony of Douglas Heay.)

Q. Now, at any time before you struck the ground, did you haul up on the stick?

A. No, I didn't haul up. I felt the stick or felt if there was any (interrupted). [65]

Q. Lift?

A. Any control, any control on the tail surfaces. You might call it lift. In other words, by going into that downdraft, I had lost my flying speed. The airplane had attempted to stall so I attempted to recover. In fact I did recover to a certain extent. I recovered enough that I could make a turn and yet not enough so you would recover fully. In other words, if I were in a stalling attitude and turned, I don't think I would have got as far down the mountain or as far as I did get. I would have spun in right there, to my knowledge or to my experience at any rate.

Q. Well now, did you have any control at all of that airplane after you made your turn?

A. Well, I made my turn and straightened out again.

Q. Did you attempt to get the nose up?

A. Just minor attempts, feeling it.

Q. And did the plane respond when you (interrupted). A. No.

Q. Well now, in these attempts that you made to regain control, what actually did you do? You say you felt it. What did you do? How do you feel it?

A. Well, the feel of the control stick in a ship—I don't know. The feeling is there, that's all. You

(Testimony of Douglas Heay.)

have enough force over your tail surfaces; there is so much tension there. [66]

Q. In what?

A. In your control—in your stick.

Q. How do you determine whether there is any tension in the stick or not?

A. Well, through experience.

Q. Well, is there any other (interrupted).

A. If it is soft, you don't have the (interrupted).

Q. Do you mean that you test whether there is any tension by pulling the stick towards you?

A. Well, yes, push or pull. You can feel it by a certain amount of stiffness or from the air flowing over your control surfaces.

Q. Now then, did you pull on that stick?

A. I pulled back to a certain degree. I am feeling to see if it has sufficient air speed to maintain control, find out if I had still the control or could get it, whatever was required.

Q. Did you feel any tension on that stick when you pulled back on it?

A. Not enough so that I could pull the nose out.

Q. Did you feel any tension on it?

A. Well, there is a certain amount there.

Q. Well, is that the normal tension that a man would feel if that—if he was sitting stationary on the ground?

A. If you're sitting stationary on the ground, it's just [67] sloppy in your hand. There is no tension there whatsoever.

(Testimony of Douglas Heay.)

Q. So it was something other than that type of tension?

A. It was beyond that. It was a little—it was stiffer than what it was or would have been if you were sitting on the ground.

Q. Did you at any time prior to the time that you actually struck the ground have the stick pulled back at all or more than normal? A. No.

Q. You didn't pull it out all the way like you were trying to climb (interrupted).

A. No. That's the last thing in the world you would ever do.

Q. That would have been the improper thing to have been done? A. Yes.

Q. Why would that have been improper?

A. You're just aggravating the stall.

Q. You mean that would have put you into the ground more rapidly?

A. Maybe not more rapidly, just spun in. I would have pulled up into a complete stall, lost all the air speed whatsoever and just come to a stop in the air.

Q. That would have happened if you hadn't had any power?

A. If I hadn't had any power? [68]

Q. Yes, if you hadn't had any power, you couldn't have got the nose (interrupted).

A. Oh, yes, you can do a power off stall. In fact that's part of your—power off and approach to stalls, that's part of your test for a private license.

Q. But at any rate, pulling that stick back as far as you could under the circumstances when you

(Testimony of Douglas Heay.)

were in a stall in a downdraft would have been the wrong thing to do, is that right?

A. That's right.

Q. And you didn't do it? A. No, I never.

Q. All right. Now, what part of that airplane hit the ground first?

A. That's a good question. I think it all hit it first as far as I know. First thing I know it was just straight and I got a windshield full of muskeg. That's all I saw.

Q. Would it be reasonable to assume that the nose hit first?

A. Well, from the looks of the airplane, the pictures I saw and what was described to me, the floats were curled back 180 degrees. My head was in the instrument panel. I was told by the C.A.A. inspector where we had hit a tree just a few feet of the ground and had slewed around a little bit.

Q. In what direction were you going when you—in reference [69] to the lake—when you hit the ground?

A. I was still heading back towards the lake as far as I know. They tell me the airplane was pointed partially around uphill again and which Joe Miraldi, he said it happened by hitting the tree just prior to contact with the ground and it had slewed the plane around uphill.

Q. Now Mr. Heay, I am sorry but I didn't understand your last answer. We were trying to get that man's name.

A. What was that last question?

(Testimony of Douglas Heay.)

Q. Do you have any independent recollection of which direction that plane was going when it struck the ground?

A. My last recollection was that I was still heading towards the lake and if I remember right, the way the hill sloped and then kind of shelved out, it would look to me like I was still heading for the lake and the last thing I know my windshield was full of muskeg and I never even heard the crash.

Q. Now Mr. Heay, what happens to an airplane when it hits a downdraft?

A. Well, if it's only a couple of hundred feet across and your doing 100 miles an hour possibly nothing much. It will get a little bumpy is about all; or if it is quite a great downdraft and you're heading into it in a climbing attitude, why with your nose high it will more or less start mushing on you, just getting soft. Your controls will get [70] soft.

Q. Do you mean by that that you lose control of the aircraft? A. You could.

Q. I don't understand.

A. You don't necessarily lose control. In other words, you're flying into a downdraft and the airplane could get mushy at the controls so (interrupted).

Q. There's the word I don't understand.

A. Well, it gets soft on the controls. I don't know how to describe it.

Q. Do you have control of the airplane if you—

(Testimony of Douglas Heay.)

if the controls get mushy? Do you have control of it?

A. Well, when they get mushy, it's an indication you're losing control.

Q. You don't have as much control as you had?

A. No.

Q. Your control has been decreased?

A. That's right.

Q. Well now, is there anything dangerous about a downdraft? A. Yes, there are.

Q. What is dangerous about it?

A. Loss of control of your airplane if you don't take proper measures. [71]

Q. Well now, what are the proper measures?

A. Usually to get the nose down; a nose down attitude and recover your air speed which you have lost in the downdraft. You're losing air speed—get that air speed back first thing, build it back up again.

Q. How do you go about getting your air speed built back up again?

A. Usually the first thing you do is lower your nose, give her full throttle, recover from that stalling attitude which a good sized downdraft could put you in.

Q. Now then, do you mean by that that you give it all the throttle that you can and fly it down into the same direction in which the downdraft is going or the wind is going?

A. If it is necessary—get down and pull out of the downdraft—get the nose down.

(Testimony of Douglas Heay.)

Q. Well then, if you recover your air speed and you can pull out, you think there is nothing dangerous about downdrafts?

A. That's a matter of opinion. I still think there is.

Q. Well, what is dangerous about it?

A. If you make your proper recovery and have room to do it in, there's nothing dangerous other than it could be an awful stress on your aircraft.

Q. What do you mean if you have enough room to do it in?

A. If you don't run out of air which I did. [72]

Q. You mean if you don't run into the ground?

A. That's right.

Q. Well then, what do you do to avoid getting into a place where you can't recover?

A. Well, there are minimum safe altitudes and it is up to you to judge what is the minimum safe altitude.

Q. You mean then it is just a matter of getting high enough so that if you run into one of these things that you can get your nose down and come out of it before you strike the ground?

A. Yes, but there are also sometimes circumstances beyond your control. In other words, you can—you never know when you're going to run into one as large as I did I don't believe. It is something out of the ordinary.

Q. Well, I am not saying that's not true. I am talking about down drafts in general. Now, you

(Testimony of Douglas Heay.)

say it is true that you can recover from a down draft if you have enough altitude, Mr. Heay?

A. Not always. That's been proven.

Q. Well now, what do you do to minimize the danger of striking the ground?

A. You've got me there. You maintain a certain altitude.

Q. It's just a matter of being high enough?

A. That's right.

Q. And the proposition is that if you had had maybe another [73] thousand feet here in this instance that you would have been able to recover this time?

A. That's possible. Of course, I don't know where that down draft is starting from. It might have been at the top of the mountain at 5800 feet and have been in the same circumstances. I dove for an awful long ways which quite a few people saw me. They had watched my take off and were standing at the Sportsman and they just said I was coming down and down and down. They expected me at any moment to flatten out and come out over the lake.

Q. And you were pulling—trying to test the controls all the time?

A. I was feeling it and she still wasn't ready to fly.

Q. But you had to do everything you could to pull it out, didn't you?

A. I had done it already. I was at full throttle, nose low attitude and just waiting for the airplane

(Testimony of Douglas Heay.)

to regain air speed, her flying speed. In that mass of air that I was inside of, it could not be done. Professor Ragle out here is (interrupted).

Q. Now I think Mr.—Professor Ragle will probably testify here.

Clerk of the Court: Defendant's identification number—plaintiffs' identifications number 2, 3, 4 and 5. [74]

(At this time, a photograph of an airplane was marked as Plaintiffs' Identification No. 2.)

(A photograph of an airplane was marked as Plaintiffs' Identification No. 3.)

(A photograph of an airplane was marked as Plaintiffs' Identification No. 4.)

(A photograph of an airplane was marked as Plaintiffs' Identification No. 5.)

Mr. Boggess: Your Honor, counsel for the defendant has seen these.

Clerk of the Court: And plaintiffs' identification number six.

(A photograph of an airplane was marked as Plaintiffs' Identification No. 6.)

Q. (By Mr. McNabb): Mr. Heay, I have handed you plaintiffs' identifications number 2 through 6 inclusive and ask you if you know what those represent?

A. A badly beat up aircraft.

(Testimony of Douglas Heay.)

Q. Any particular aircraft, Mr. Heay?

A. Well, it's the one that I rented from Dean Phillips, 803 Mike.

Q. M? A. M.

Q. Do those photographs truly represent the condition of [75] that aircraft after the accident which occurred at Paxson Lake on the 20th day of September, 1950?

A. I don't know. Jess Bachner pulled me out of the airplane and headed me down the mountain. That's all I know.

Q. Do you know that those are pictures of that particular airplane?

A. Well, from the description I have been given, they are.

Q. Is there anything about those pictures with which you can identify them with the airplane which you were flying on the 20th day of September?

A. Yes, the picture of the lake here in the background. It's evidently where the wing tip dug in. I didn't know the N C number of the aircraft. That's why I say (interrupted).

Q. You didn't know it? A. No.

Q. What did you just call that number from then?

A. From the photograph on the tail surface.

Q. Does that appear to be the same airplane?

A. Yes, it does from the description I have.

Q. Well, you testified that the floats had been

(Testimony of Douglas Heay.)

turned back at 180 degree angle and the motor here is turned up at a 45 degree angle.

A. As I had been told.

Q. So, you don't know whether this is the same airplane or not then? [76]

A. No, I don't. I couldn't swear. Could you? I was out when—after I hit.

Q. Now Mr. Heay, you say you made a complete circle of that lake?

A. No, not a complete circle of the lake. That lake is 12 miles long.

Q. Well, I don't mean—you turned 360 degrees?

A. Yes.

Q. And you were climbing all that time?

A. I was in a climbing attitude, yes. I was climbing.

Q. And you were climbing at about 70 miles an hour?

A. I would say so, yes. I know one time I was doing 70 indicated. I was doing over 70. You add 2 feet per thousand feet and the elevation of that lake is 2500 feet to start with.

Q. Now then—but you do not know how many feet per minute you were climbing?

A. No, I don't. When I made the turn south, I was going down wind again and I don't believe I was climbing quite as fast as I was when I was going north. I was going faster—my ground speed had increased.

Q. Now, during that 360 degree turn which you

(Testimony of Douglas Heay.)

made over the lake, did you notice any turbulence there? A. Not that I remember.

Q. Well, as you crossed the northern end of the lake—I believe you testified you got or flew a little north of the [77] lake? A. Yes.

Q. Did you feel any turbulence at all up there?

A. Not that I remember.

Q. Do you remember (interrupted.)

A. At least not enough that it would cause any alarm.

Q. Did you feel any turbulence as you approached the hills? A. I don't believe so.

Q. Did you know that there was any wind blowing?

A. Yes, I knew there was wind blowing.

Q. Well now, when you were going down wind south, did you feel any turbulence then?

A. Not that I remember. I probably noticed just a slight increase in the ground speed but that was about all.

Q. But you did notice an increase in the ground speed?

A. I possibly did. It didn't register. I mean, it was something that was normal when you turn down wind. You're bound to get an increase.

Q. Mr. Heay, after you got that airplane airborne, did you feel any bumps at all?

A. Turbulence?

Q. Well now, that's the point. We don't know what your definition of turbulence is. Was it bumpy any? A. Not that I recall.

(Testimony of Douglas Heay.)

Mr. McNabb: Your Honor, at this [78] time, we would like to excuse this witness with the—reserving the right to recall him.

The Court: Very well.

(At this time, Mr. Douglas Heay was excused from the witness stand.)

Mr. Parrish: Your Honor, Mr. McNabb has to go to the Commissioner's Court for just a few minutes. We have—another reason we asked for—to withdraw Mr. Heay was so that we have a witness that is due back at 26 Mile this evening and I want to call Mr. Phillips for a few moments until Mr. McNabb gets back and then if possible we would like to call that witness at 26 Mile.

The Court: Very well.

DEAN PHILLIPS

called as a witness in his own behalf, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Parrish:

Q. State your name, please?

A. Dean Phillips.

Q. Are you one of the plaintiffs in this action?

A. I am.

Q. Where do you live?

A. King Salmon, Alaska. [79]

Q. On the 20th day—on or about the 20th day of September, 1950, where did you reside?

(Testimony of Dean Phillips.)

A. Fairbanks, Alaska.

Q. Are you one of the owners—were you at that time one of the owners of a Piper Super Cruiser aircraft?

A. I was.

Q. 115 horse power engine?

A. I was.

Q. Now, about the 20th of September, 1950, did you have any dealings with Mr. Douglas Heay, the defendant in this action, concerning this airplane?

A. I did.

Q. Will you just tell the court—did you have any conversation with him?

A. Yes, I did.

Q. Will you tell the court what they were?

Mr. Boggess: Just a moment, your Honor, unless it is established when, where and who was present during these conversations.

Q. (By Mr. Parrish): When did you have these conversations?

A. I had the first one in the morning.

Q. And where was that?

A. At Week's Tower.

Q. Who was present? [80]

A. I believe Walt Bear and Jim Freericks.

Q. And what did you say and what did Mr. Heay say?

A. Mr. Heay requested to rent our Super Cruiser for the purpose of going up to Tangle Lakes to recover a Cessna 170 that he had had an accident with that week and we told him—correction—I told him we didn't rent it and if he couldn't possibly find any other aircraft that he could rent or borrow,

(Testimony of Dean Phillips.)

that we would see if we couldn't work something out on the Super Cruiser.

Q. Was that the extent of the conversation at that time, Mr. Phillips?

A. Approximately, yes.

Q. When did you have the next conversation with him, if any?

A. It was still that morning as I recall at Week's Tower under the same circumstances and he said he couldn't find any other aircraft and that he needed to get up there very badly in order to get the airplane out before it froze in the lake and he had wanted to use the Super Cruiser. I told him that we didn't rent it; that I would let him use it. He bought his own gas and oil of course and I told him I would check him out and I would meet him downtown later that afternoon after dinner.

Q. And was there any conversation at any time concerning the condition of the airplane? [81]

A. Yes. I told him while I was checking him out or before I checked him out (interrupted.)

Q. Who was present?

A. I don't believe anybody but Mr. Heay and myself. It was I believe out in front of the Northern Tap. I don't remember the exact location. I just told him that we had just had the engine overhauled and it had less than a hundred hours on it so he would know that he didn't have to treat the engine with any out of the ordinary care because he would know that we had it worked on and just took him down to the airplane to see that he

(Testimony of Dean Phillips.)

could handle it correctly because he hadn't flown that particular type of aircraft for some time he said and I just asked him how many days he would be gone and he said approximately three days and I just requested he bring it back in one piece and he said he would, and that's just about all. Except he said that Mr.—I forget his name—the man at Arctic Pacific, the fellow who was with him out at the lake—was going up with him.

Q. Was there any conversations about him taking a mechanic or anything of that nature?

A. He said that this fellow that was going with him was going to see if he could get the airplane to work on it.

Q. Who was that, do you know?

A. I know him but I can't think of his name at present. Ernie Hubbard. It was Ernie [82] Hubbard.

Q. And when did you first find out about—let me ask you this. Did he take the airplane?

A. Yes, he did.

Q. And when did you first find out that the airplane had been destroyed?

A. I believe it was the next day. It was after four o'clock. I got off watch at four o'clock and I was home at the time and Jim Freericks came over to the house—to my house—and told me that Doug Heay had stacked up the airplane.

Q. Who is Jim Freericks?

A. He's the fellow that works at the tower with me.

(Testimony of Dean Phillips.)

Q. And what did you do then?

A. Well, I—first I thought he was joking and pretty quick he convinced me it was the truth so I went over to Mr. Heay's house to see him and I can't remember if I rode with Freericks or whether I went in my own truck. I think I went in my own truck and we went in the house approximately the same time.

Q. Who was at the house?

A. Mrs. Heay and Doug Heay and Jim Free-ricks and myself.

Q. Was there anybody else there?

A. Not that I recall.

Q. Did any conversation concerning the airplane take place at that time? A. Yes, it did. [83]

Q. Between you and Mr. Heay? A. Yes.

Q. What did you say and what did he say?

A. I asked him what had happened and he told me approximately the same words he described the accident here and he said he was very sorry it happened. Of course I said I was too. He said that he would either replace the airplane or before that, he said that—he asked me what I thought the air-plane was worth and I told him \$3,000 and I told him the reasons I thought it was worth \$3,000 and he agreed to it.

Q. What were those reasons?

A. Well, the price—original price of the air-plane plus the (interrupted).

Q. What was the original price if you remember?

(Testimony of Dean Phillips.)

A. We paid \$2,000, the initial cost of the airplane.

Q. And what made it worth \$3,000 then?

A. We paid \$1200 for a pair of Edo floats for it and we had bought a \$300 Sensich 2 position prop which cost approximately \$300 and we had (interrupted).

Q. Is that a nominal (interrupted).

A. That was a new prop. That was the standard price for it.

Q. Was that in addition to the regular prop?

A. Yes, it was.

Q. Okay. [84]

A. We had sold the original prop after we bought the Sensich.

Q. Do you remember what you got for the original prop? A. \$30.

Q. How much again did you pay for the new prop?

A. Approximately three hundred. It was over three hundred.

Q. What other (interrupted).

A. We bought a pair of skis from United Air Motive in Anchorage for approximately \$225 and had the landing gear beefed which was compulsory in order to have the skis put on the aircraft and then we had our engine which was formerly a 100 horse, we had that converted to 115 horse power and at the same time we had the aircraft engine majored.

Q. Not including the major overhaul, what would

(Testimony of Dean Phillips.)

be the cost of converting the engine to 115 horse?

A. Without labor, I believe it's right around \$100.

Q. And with the labor how much is it?

A. Well, it takes a complete tear down of the engine which consists of a major overhaul.

Q. What I am trying to get at is to convert the extra 15 horse, how much money to have that portion of the reconditioning (interrupted).

A. I would estimate with the labor about \$300 not counting the parts for the major overhaul such as bearings and rings and so on. [85]

Q. The major overhaul would do nothing more than bring the airplane up to what condition?

A. Excellent condition I would say—near new—as near new as it could be without being new.

Q. How do you define a major overhaul if you know?

A. That is a complete tear down of the engine, replacement of all bearings and rings if they need it, rods and everything that is rebuilding.

Q. It adds to rebuilding the engine?

A. That's right.

Q. Now, is there any inspection of those engines after a major?

A. Well, the mechanic that majors them inspects them. He is authorized to do that.

Q. By whom is he authorized?

A. Civil Air Administration.

Q. And had this plane been inspected after its major?

A. It had.

(Testimony of Dean Phillips.)

Q. And what condition then do you think the engine was in after the major overhaul?

A. Excellent condition and that was the opinion of the mechanic that overhauled it.

Q. Had you flown the aircraft?

A. Yes, I had.

Q. And did you have any conversation with Mr. Heay about [86] the aircraft engine and its condition?

A. Yes, I did.

Q. When did that take place?

A. At the—well the conversation before he asked to use the airplane and also at the time he asked to use it.

Q. Did he have an opportunity to fly the engine before he took it?

A. Yes, I checked him out. I went up with him for approximately half an hour.

Q. Going back over your list to make sure on it, the original price of the airplane was \$2,000?

A. That's correct.

Q. \$1200 for the floats? A. That's correct.

Q. And what condition were they in?

A. Very good condition.

Q. How old were they?

A. As far as I know they were about a year or a year and a half old.

Q. And how much had they been used?

A. One summer.

Q. About how many months?

A. Approximately 3 I would say.

(Testimony of Dean Phillips.)

Q. Is there any definite life to floats that you know of?

A. No. As long as they are taken care of, they are good [87] indefinitely.

Q. I believe you stated \$300 for a propeller?

A. That's right.

Q. Additional propeller.

A. That's right.

Q. And \$225 for skis? A. That's right.

Q. What else?

A. \$60 for the beefing of the gear.

Q. What is beefing of the gear.

A. That's—on this particular model aircraft, they had reinforcements to go on the landing gear in order to hold the shock of landing on the skis.

Q. \$300 for the conversion and the major overhaul?

A. No. The major overhaul and the conversion bills on that was around \$600. It was pretty close to that.

Q. \$300 of it was just conversion?

A. Yes, that's about what it would run for the conversion without the parts for the major. Now, that's my estimate on it.

Q. That would total \$4,085 and your salvage out of the old prop was about how much?

A. \$30 we got when we sold it.

Q. So in the airplane you figured you had \$4,055 approximately? [88]

A. That would have been the approximate expenditures for the equipment listed.

(Testimony of Dean Phillips.)

Q. Now, how long had you had the airplane?

A. We bought it in May, of '48. We had it approximately a year and a half altogether.

Q. Was it new when you bought it?

A. No, it wasn't.

Q. Can you state the condition of the airplane?

A. When we bought it? It had approximately 280 hours on it and it was in very good condition.

Q. And what—in what condition was it when you loaned it to Mr. Heay?

A. I would say with the engine and the floats and the whole works, I would say good condition.

Q. Was this plane certificated in any way by the Civil Aeronautics or C. A. B.?

A. Yes, it was by the Civil Aeronautics.

Q. And how long since its last inspection?

A. It had been inspected last at a 100 hours previously and it had been worked on by a mechanic within thirty or forty hours of that time.

Q. How much of this to your recollection did you discuss with Mr. Heay at his house that evening?

A. Oh, I think it was just gone over very lightly.

Q. And what did he say when you estimated the value at [89] \$3,000.00?

A. He said he thought that was fair enough or words to that effect.

Q. Now, did he make any other conversation—did he say anything else about paying for the airplane at that time? A. No, he didn't.

(Testimony of Dean Phillips.)

Q. Well now, I will ask you, was there any conversation concerning replacing the airplane at that time?

A. I don't believe there was at that particular time. Mr. Heay was kind of feeling kind of bad that day so we didn't carry on a lengthy conversation.

Q. When was the last time you had any conversation with Mr. Heay concerning the airplane?

A. I believe it was after the engine was brought down from the lake.

Q. About when was that?

A. Well, it was approximately a week later. I don't remember exactly the number of days.

Q. Under what circumstances did that conversation take place?

A. It was in Mr. Heay's home.

Q. Who was present at that time?

A. I believe just Mr. Heay and myself were present.

Q. Was Mrs. Heay there?

A. Not that I recall. [90]

Q. What was said at that time?

A. Mr. Heay told me about them bringing the engine down and that they were going to open it up and see if it was damaged internally. It looked all right from the outside and I said it shouldn't—he should be able to sell the engine for a price and that would make the bill a lot less for him.

Q. What did he say?

(Testimony of Dean Phillips.)

A. He said "Yes, that's right" or words to that effect. I don't remember exactly.

Q. When was the—let me ask you. Did he say who brought the engine down?

A. Yes, he did.

Q. And who was that?

A. Jim Freericks and Louie Frank.

Q. Is Louie Frank here?

A. I believe he is outside at present.

Q. And is Jim Freericks here?

A. Yes, he is.

Q. Did you have any further conversation about the engine then? A. Yes, at a later time.

Q. About when?

A. Oh, it was probably three or four weeks later. I am not sure exactly. [91]

Q. Where did it take place?

A. I believe that took place in the Northern Tap Room.

Q. And what was said then?

A. He told me that Louie Frank had taken the engine down and had measured it and it was all right internally. The engine wasn't damaged.

Q. Did you have any conversation with Mr. Heay at that time about the skis?

A. Yes. He told me (interrupted).

Mr. Boggess: Let's establish the time.

The Witness: I believe it was the first part of November sometime.

Q. (By Mr. Parrish): Where did it take place?

(Testimony of Dean Phillips.)

A. I believe it was in the Northern Tap Room. I am not sure.

Q. Who was present then?

A. Just Mr. Heay and myself I believe. I don't think anybody else was listening in.

Q. What was said at that time?

A. He asked me about the skis, what condition they were and where they were and I told him that they were in very good condition. I told him that they were in my basement yet and he said that he was going—he thought he would try to sell [92] them or words to that effect.

Q. Do you know if he made any arrangements to sell them? A. Yes, I do.

Q. Well now, will you state how you know that?

A. Mr. James came to my house one evening in November sometime and asked if there was a pair of skis at the house that belonged to Mr. Heay. I said there was. He said that he was dicker-ing to buy them and that he would like to look at them.

Q. Did you make any—have any conversation about selling the skis with this man?

A. I took him down in the basement and showed him the skis and he left and oh, approximately probably three hours or so, he came back to the house and showed me a receipt signed by Doug Heay.

Q. Do you know Mr. Heay's signature do you think?

(Testimony of Dean Phillips.)

A. I'm no handwriting expert but I have seen his signature on a couple of checks and I think I would recognize it.

Q. Let me ask you this. Did you have any conversation with Mr. Heay about his having sold the skis? A. After, yes.

Q. When was that?

A. Oh, I don't know. It was probably a few days later when I met him either at the Northern Tap or on the street.

Q. What was said then? [93]

A. I told him that I thought he had given the fellow that bought the skis a real good buy and he said that well, he hadn't seen them and he didn't know what they were worth so he just sold them for \$150.

Q. Did he make any acknowledgment at that time that he had sold the skis?

A. Yes, he had sold them for \$150.

Q. To whom?

A. Floyd James I believe his name is.

Q. Did you at any time ever ask anybody to go get the engine? A. No.

Q. Did you ask Mr. Heay to go get the engine for you? A. No.

(At this time, Mr. Parrish handed a document to Mr. Boggess.)

Mr. Parrish: I ask that this be marked for identification.

Clerk of the Court: Plaintiff's identification number 7.

(Testimony of Dean Phillips.)

(At this time, a receipt dated 10/25/50 was received and marked as Plaintiffs' Identification No. 7.)

Q. (By Mr. Parrish): I hand you this paper and ask you if you know what it [94] is?

A. Yes.

Q. Will you state what it is?

A. It is the receipt that Mr. James showed me when he came over to get the skis.

Q. And by virtue of this receipt, you gave him the skis, is that right? A. I did.

Q. And do you recognize the signature?

A. Yes, as far as I am able to, yes.

Q. You believe that is Mr. Heay's signature?

A. I do.

Mr. Parrish: We offer it in evidence, your Honor.

Mr. Boggess: No objection, your Honor.

The Court: May be admitted.

Clerk of the Court: Plaintiffs' Exhibit "B."

(At this time, Plaintiffs' Identification No. 7 was offered in evidence and received and marked as Plaintiffs' Exhibit "B.")

The Court: We will take a 10 minute recess.

(At this time, a short recess was [95] taken and thereafter the trial of this cause was resumed.)

The Court: Counsel ready to proceed with the trial?

(Testimony of Dean Phillips.)

Mr. Parrish: Ready, your Honor.

Mr. Boggess: Ready, your Honor.

(Mr. Dean Phillips resumed the witness stand.)

Direct Examination

(Continued)

By Mr. Parrish:

Q. Just to clarify the record, who are the owners of this aircraft in question here?

A. Myself, James Kelly and Charles Gray.

Q. Were you all equal owners?

A. We were.

Q. Now, concerning the engine again, did you ever have any conversation with Mr. Heay as to whether he sold the engine or not?

A. Yes, I did.

Q. When was that, where was it, and who was present?

A. It was at the Northern Tap and nobody but myself was present and Mr. Heay. I don't know exactly when. It was in January sometime as I remember, first part of January or the last part of December.

Q. What was said at that time?

A. I went in there and—to find out about getting some [96] more money. I told him that we needed it very badly and we were willing to take the salvage at a fair price and I had an itemized list of the parts that were left and a fair price

(Testimony of Dean Phillips.)

on them which I got by going out to the field and (interrupted).

Q. Did you take the salvage?

A. No, I did not.

Q. The engine now, did you sell it?

A. I did not.

Q. Do you know if it was sold?

A. I just heard that it was sold. Louie Frank called me up sometime in the last part of December or first part of January. I don't exactly remember when.

Q. Did Mr. Heay ever tell you that he sold it to Mr. Frank? A. Yes, he did.

Q. When did he do that?

A. At the Northern Tap he told me that at the time we were having the conversation on these parts.

Q. Now what was said?

A. He said that—I told him that the prices we had given him—when it came to the engine, I told him \$400 because Mr. Frank had told me that he was in the process of buying it from Mr. Heay and Mr. Heay told me that he didn't want to sell it to us for \$400 since Louie Frank was going to give him \$450 for it. [97]

Q. As near as you know then, it would still be in Mr. Heay's possession or he would have sold it to Mr. Frank? A. As far as I know.

Q. Did you ever bring any of the salvage down from the wreck? A. No, I did not.

(Testimony of Dean Phillips.)

Q. Do you know who brought it down if any-one, of your own knowledge, do you know?

A. I have never saw anybody been—bring any down.

Q. Now, have you received any money on the purchase price of the airplane?

A. Yes, I have.

Q. How much have you received?

A. A total of \$650.

Q. From whom did you receive that?

A. Mr. Heay.

Q. Has any more been paid?

A. No, it has not.

Q. Have you ever had any conversation with Mr. Heay about paying any more?

A. Yes, I have.

Q. When was that?

A. Well, I had one every week for a while.

Q. Where was it?

A. Most of them over the telephone. [98]

Q. Now, what was—can you place any particular conversation?

A. Well, I remember the conversation, but I don't remember the exact date.

Q. What was said? What was the substance of these conversations if you remember?

A. I asked him if he could help us out some on the money he owed us on the airplane and he said well, at present he couldn't but he would have some money for us the following Monday.

Q. Did he ever pay you then any more?

(Testimony of Dean Phillips.)

A. No, he did not.

Q. Did he ever deny that he owed you the money? A. He didn't.

Q. You are positive that you never received any money from any buyers of the salvage?

A. That's right; except for a landing gear that Jess Bachner sold and I turned that over to Mr. McNabb.

Q. How much was that?

A. That was \$35.

Q. Did Mr. Heay know about that?

A. I don't know if he did or not. I mentioned to Mr. Heay at one time that Mr. Bachner's got a chance to sell the parts and he said he would and Mr. Heay said that was okay because you can't use the parts yourself and it's just if [99] somebody happens to come along and need a part and he was in a position to know if any such thing came up.

Q. Other than that, have you ever taken possession of any parts or the airplane from the scene of the crash? A. No, I have not.

Q. And Mr. Heay has never denied having taken over the airplane?

A. Not to me, he hasn't.

Q. And he has agreed to pay you the \$3,000?

Mr. Boggess: Just a moment. That calls for a conclusion of the witness. There has been no prior testimony that he agreed to do anything and the question is also leading, your Honor.

Q. (By Mr. Parrish): Well, did you testify

(Testimony of Dean Phillips.)

that you had any conversations with Mr. Heay about the salvage on the aircraft?

Mr. Boggess: The record will show what he testified to. I object.

The Court: You're just refreshing your memory? You want him to tell you what he has already told?

Mr. Parrish: Yes, that's all I was doing. I'll just let it go, your Honor.

The Court: All right.

Mr. Parrish: I believe he testified [100] to it anyway.

Q. (By Mr. Parrish): Did he tell you he would pay you \$3,000 at any time, Mr. Phillips?

Mr. Boggess: I will object to that, your Honor.

Mr. Parrish: Well, I asked if he told him that.

The Court: Objection overruled.

The Witness: He did.

Q. (By Mr. Parrish): And when was that?

A. He told me that the first time I saw him after the accident.

Q. And on the telephone, did he ever make any statements relative to when he would pay you?

A. Yes, he did.

Q. And when did he say he would pay you?

A. He told me it would be the week from the time we had the conversation, the following Monday.

Q. Did he ever pay you?

A. No, he did not.

Q. Were the skis on or about the airplane at the time Mr. Heay took it?

(Testimony of Dean Phillips.)

A. What do you mean? [101]

Q. Were the skis on the airplane at the time Mr. Heay took it? A. No, they were not.

Q. Where were the skis?

A. The skis were in my basement, stored.

Q. And did you deliver the skis to anyone?

A. I did.

Q. And who was that? A. To Mr. James.

Q. When was this \$650 paid?

A. I don't remember the exact dates. He paid \$400 approximately two—three weeks after the accident and then another \$250 between two and four weeks after that. I am not positive on the dates, but it wasn't too long after the accident.

Q. Do you recall whether the \$650 was paid before or after your conversations about the engine?

A. The money was paid after the conversations about the engine. He told me that somebody had gone up and gotten the engine.

Q. Did you ever have any conversations with Mr. Heay about where he would get the money to pay for the plane? A. No, I did not.

Q. Do you have an opinion as to the reasonable value of the plane at the time of the accident? [102]

A. I do.

Q. What is that?

A. I believe it was worth \$3,000.00.

Q. And what do you take into consideration in arriving at that?

A. The price of the aircraft at the time, the condition of this particular aircraft (interrupted).

(Testimony of Dean Phillips.)

Q. The number of hours on it?

A. That's right. That includes it.

Q. The age of it? A. That's right.

Q. And I believe you testified that those—that you had a conversation with Mr. Heay about that?

A. That's right.

Q. Was there any conversation with Mr. Heay as to when he would pay the \$3,000.00 at the time that the \$3,000.00 was discussed?

A. The first time the day after the accident, there was not.

Q. Was there any at any further time?

A. Yes. I asked Mr. Heay (interrupted).

Q. When was it?

A. It was approximately a week or 2 weeks after the accident when—I am not sure of the time.

Q. Where was it? [103]

A. I believe it was in Mr. Heay's home.

Q. Who was present?

A. Nobody but myself and Mr. Heay as far as I can remember.

Q. What did he say at that time concerning when he would pay the \$3,000.00?

A. I asked him—I told Mr. Heay he owed \$800 on the airplane yet. That was on the overhaul and also on the floats and that we would like to get that paid off as soon as possible and I asked him if he wouldn't give us the \$800 right away and if he would do that, we would let the rest of it go until he was back on his feet as he was in debt at the

(Testimony of Dean Phillips.)

time and he could get things straightened up and he agreed to it.

Mr. Parrish: No further questions.

Cross-Examination

By Mr. Boggess:

Q. Where did the first conversation relevant to this aircraft occur? A. At Week's Tower.

Q. Who was present?

A. Mr. Heay, myself and I believe Jim Freericks and Walt Bear. I am not sure about the latter two.

Q. At that time, did anything arise in your conversation with Mr. Heay about what Mr. Heay would pay you for the use [104] of that aircraft?

A. Yes, it did.

Q. Was Mr. Heay to pay for the use of the aircraft?

A. Mr. Heay was to pay me nothing for the use of the aircraft.

Q. Were you to receive any consideration from Mr. Heay for the use of the aircraft?

A. I was not.

Q. Did you or any of your partners require the use of an aircraft on the particular day that Mr. Heay contemplated using it?

A. We didn't require it. We were going to use it.

Q. Did you use an aircraft that day?

A. One of the partners did use an aircraft that day.

(Testimony of Dean Phillips.)

Q. Did—was the partnership billed for the use of that aircraft on that particular day?

A. I think Mr. Heay was billed for that, although I paid it.

Q. Why was Hr. Heay billed for that? Was that according to some prior understanding reached at Week's Tower?

A. Mr. Heay had agreed to pay rent on an aircraft to go down and get some moose meat while he was using ours. Otherwise (interrupted).

Q. There was some consideration for lending your aircraft to Mr. Heay, isn't that correct? [105]

A. No, there was not. He never paid it. I paid the bill.

Q. But there was an agreement that he compensate you at that time for paying for the use of the other aircraft?

A. I don't know that it was compensation, no.

Q. You were going to receive some value then, were you not, Mr. Phillips? A. I didn't.

Q. But you intended to receive some value, did you not?

A. No, I wouldn't say that it was value received.

Q. How—did you say that Mr. Heay was billed for the rental of that other aircraft?

A. That's right.

Q. Who gave him the bill?

A. I don't recall who gave him the bill. I suppose one was mailed to him. It was given to me.

Q. And after it was given to you, what did you do with it?

(Testimony of Dean Phillips.)

A. I gave it to Jim Freericks to give to Mr. Heay.

Q. And that is a bill that Mr. Heay would have, isn't it?

A. I don't know if he has it or not.

Mr. Boggess: Would you mark that for identification?

Clerk of the Court: Defendant's identification "A."

(At this time, an invoice dated 9/24/50 addressed to Dean Phillips was introduced and marked [106] Defendant's Identification "A.")

(Defendant's Identification "A" was shown to Mr. Parrish.)

Q. (By Mr. Boggess): Mr. Phillips, I hand you Defendant's Identification "A" and ask you whether you can identify that?

A. It's a bill made out to me for \$114 for the use of a float ship.

Q. Have you ever seen it before?

A. I don't know if I have seen this exact one. I seen one like it.

Q. What did you do with the one like it?

A. I gave it to Mr. Freericks to give to Mr. Heay.

Q. That's all. What is your occupation?

A. I am an airport traffic controller.

Mr. Parrish: That wasn't offered, was it?

Mr. Boggess: What?

Mr. Parrish: This bill.

(Testimony of Dean Phillips.)

Mr. Boggess: No, I didn't offer it.

Q. (By Mr. Boggess): What did you say your occupation is?

A. I am an airport traffic controller.

Q. And where are you employed?

A. For the Civil Aeronautics Administration at King Salmon, [107] Alaska.

Q. Are you employed at Naknek?

A. That used to be Naknek. It's now King Salmon.

Q. How long have you been employed down there?

A. I am down there approximately 2 months.

Q. And are you in charge down there?

A. I am.

Q. And do you have anyone down there that replaces you when you're absent?

Mr. Parrish: We object, incompetent, irrelevant, immaterial.

The Court: Objection sustained.

Q. (By Mr. Boggess): When did the second conversation—where did the first conversation occur after the accident with the defendant, Mr. Phillips?

A. At his home.

Q. And when was that?

A. That was the evening of the accident I believe. It was the first evening Mr. Heay was home after the accident.

Q. That would be the evening of the accident, you believe?

A. If he came home that day, yes.

(Testimony of Dean Phillips.)

Q. Had anyone advised you prior to going to see Mr. Heay that day that he wasn't in very good shape and probably not able to converse with [108] you?

A. Well, they said he wasn't in very good shape.

Q. Did anyone advise you not to go see him?

A. Nobody advised me not to go see him.

Q. Did Jim Freericks advise you not to go see him?
A. No, he did not.

Q. Do you recall Jim having been present—Jim Freericks having been present at that conversation?

A. I do.

Q. Now, you stated that it was during this conversation, this first conversation that Doug Heay agreed to pay you the sum of \$3,000, is that correct?

A. That's correct.

Q. State to the best of your recollection what his exact words were with reference to the payment of \$3,000?

A. I can't recall exactly the words, but he asked me what the—he said he was sorry about the airplane being smashed and he said that he would replace it or by it or words to that effect, and he said—asked me what I thought the airplane was worth and I told him \$3,000 and I asked him if he thought that was fair and he said "Yes," or words to that effect.

Q. At that time, you have just testified, that Mr. Heay offered to replace your aircraft?

A. Or (interrupted).

(Testimony of Dean Phillips.)

Q. Or buy it. Did he make any offer to replace your [109] aircraft at that time?

A. I don't believe he did at that time with any specific airplane.

Q. Do you recall whether or not he specifically made an offer to replace your damaged aircraft with an aircraft belonging to Hugh House?

A. I do.

Q. Did you know what type of aircraft Hugh House owned? A. I did.

Q. What type of aircraft did he own?

A. He owned a Super Cruiser.

Q. Do you recall now that Mr. Heay offered to replace your aircraft with House's Super Cruiser?

A. I do.

Q. And what was your reaction to that?

A. I told him no, we didn't want that aircraft; we wanted one in as good a shape as ours and in my estimation it wasn't in as good shape as ours.

Q. Just exactly what was wrong with House's aircraft? Why wasn't it in as good shape as your aircraft?

Mr. Parrish: We object to that as being incompetent, irrelevant and immaterial and the reasons why this party would not accept that aircraft would not tend to prove or disprove any of the issues in this case.

The Court: Objection sustained. [110]

Mr. Boggess: If the Court please, I would like to make the following offer.

The Court: Very well.

Mr. Boggess: The relevancy of this line of testi-

(Testimony of Dean Phillips.)

mony is that if Doug Heay offered to replace this plaintiff's aircraft with an aircraft in as good a condition and the defendant contends that he did, that Doug had promised to replace his aircraft or would if he could obtain a replacement and would replace it, that would be some evidence that the demand of the plaintiffs now is excessive because perhaps Mr. Heay could obtain—could have obtained a comparable aircraft for \$2,000.00 or \$2,500.00 or much less than the plaintiffs demand in this case.

The Court: Offer denied.

Q. (By Mr. Boggess): Now, in your complaint, Mr. Phillips, you have caused your attorneys to allege that at the time you loaned this aircraft to Mr. Heay, that Mr. Heay agreed to pay the costs of repairing it if it were damaged and agreed to pay its reasonable value if it were destroyed. Now, in direct examination, you have not testified to anything more than you admonished Mr. Heay to bring it back in one piece. Now, do you recall Mr. Heay having made any specific promises to repair that aircraft if it were damaged and replace or pay you the reasonable value of that aircraft if it were [111] destroyed, Mr. Phillips?

A. He told me he would bring it back in one piece.

Q. Is that all he said relevant to that particular subject, just that he would bring it back in one piece? A. That's all I can recall at present.

Q. Now, at the first conversation you had at Mr.

(Testimony of Dean Phillips.)

Heay's home, was the subject of salvage ever mentioned?

A. I don't remember if anything was said about salvage. I told him that it looked to me like the whole thing was a complete washout as far as the airplane goes, and I didn't know anything about the condition so I didn't know if there was any salvage or not.

Q. When you set the price of \$3,000.00 as you have stated you set it, were you making any allowance for salvage whatsoever?

A. No, I didn't want the salvage.

Q. Well, in figuring the price of \$3,000, did you take into account the salvage?

A. When I figured the price of \$3,000.00, I figured the price of the airplane complete and whatever there was that went with it.

Q. That would include the salvage then, would it not?

A. If there was salvage, I suppose it would, yes.

Q. How could you set the reasonable value of the aircraft at \$3,000.00 if you didn't know the condition of the engine [112] that was still up at Paxson Lake?

A. He wasn't buying the airplane in useable shape.

Q. In your conception, this is a contract to purchase a demolished aircraft, is that correct?

A. That's right.

Q. And nothing more or less?

A. That's right.

(Testimony of Dean Phillips.)

Q. Now, you have testified—correct me if I am wrong—that \$300.00 would be the approximate cost of conversion, that is, converting the engine to a higher aircraft—to a higher horse power engine?

A. That's right.

Q. How did you arrive at the figure of \$300.00? Was that actually charged to you?

A. Yes, the bill was sent to me. The full bill was more than three hundred. I am not counting the parts for the major overhaul. The way I arrived at that figure, I know the kits for converting a 100 horse power engine to 115 horse power engine is approximately \$100.00 and the labor on it would be about twice what the kit is. That's what I was told by a mechanic.

Q. You did your own labor then? A. No.

Q. Who paid for the labor?

A. We did. [113]

Q. And how much did you pay?

A. The full bill came to just a little under \$600.00 as I recall. I don't recall the exact amount of the bill but that was for a complete overhaul and a conversion.

Q. Who did that work?

A. Fairbanks Aircraft Service.

Q. You replaced this 100 horse power with a 115 horse power, is that right?

A. We didn't replace it. It was the same engine converted.

Q. I see. Now, you stated that—I believe—that

(Testimony of Dean Phillips.)

the original purchase price of this aircraft was \$2,000.00, is that correct? A. That's correct.

Q. From whom did you purchase that aircraft?

A. Bruce Neilson.

Q. What does Mr. Neilson do?

A. He's some kind of an equipment operator, I believe.

Q. Here in the Territory?

A. I don't know where he is. I never knew him before we bought the aircraft.

Q. How many of you joined in the purchase of that aircraft? A. Three.

Q. And who were they?

A. Walter Bear, James Kelly and myself.

Q. And I assume then that Walter Bear sold out? [114] A. That's correct.

Q. And he sold his interest to James Kelly?

A. That's correct.

Q. And you recall when he sold his interest to James Kelly?

A. Sometime in the spring, last spring, the spring of 1950 sometime. I don't recall. Sometime in the spring it was.

Q. Had you converted your aircraft at the time?

A. No, we had not.

Q. You had not converted? A. No.

Q. Had you bought any—had you changed the prop? A. Yes.

Q. And had you procured the floats at that time? A. No.

Q. Had you procured the skis at that time?

(Testimony of Dean Phillips.)

A. That's right, we had.

Q. Now, do you have any idea what the purchase price was for his interest? A. I do not.

Q. You do not know? A. I do not know.

Q. Have you ever talked to Kelly about it?

A. Kelly doesn't know anything about it. [115]

Q. Didn't (interrupted).

A. He didn't sell it.

Q. Didn't Kelly buy from Bear?

A. Pardon?

Q. Who bought Bear's interest?

A. Gray bought Bear's interest.

Q. Have you talked with Gray about how much he paid for it? A. I suppose I did.

Q. Do you remember how much he paid for it?

A. No, I don't.

Q. Now, from whom did you purchase this propeller?

A. United Air Motive. That's in Anchorage.

Q. That's an Anchorage outfit? A. Yes.

Q. When did you purchase it?

A. About June after we bought the aircraft, June or July, something like that. I don't exactly remember the date.

Q. When did you purchase the skis?

A. Purchased them in November.

Q. That would be November of when?

A. After we bought the aircraft, about approximately 7 or 8 months after we bought the aircraft.

Q. What year?

(Testimony of Dean Phillips.)

A. Well, that would be '49 I think. I am not sure. [116]

Q. And from whom did you buy the skis?

A. United Air Motive.

Q. And beefing the aircraft. You spoke of beefing. Who beefed it?

A. United Air Motive.

Q. Now, from the time you purchased this aircraft, Mr. Phillips, and the time that the aircraft was destroyed at Paxson Lodge, how many hours did you put on that aircraft?

A. Approximately 700 I would say.

Q. And was that one of the factors you considered in setting a reasonable value of \$3,000?

A. It was.

Q. Just exactly what kind of an allowance did you make for 700 hours use?

A. Well, we didn't figure that we were going to get \$2,000 alone for the airplane. We didn't figure—we didn't prorate the thing off on the hours it was flown. After all, it did have a newly overhauled engine in it which is practically as good as a new engine.

Q. Well, you just stated to me that you did make some allowance. I would like to know what kind of mental logistics you went through to make some kind of allowance for it?

A. We just figured the worth of the airplane at the time.

Q. How did you take 700 hours of flying into

(Testimony of Dean Phillips.)

consideration for figuring the worth of the airplane at the time? [117]

A. We looked up in the Trade-A-Plane to see how much they sold for.

Q. Do you recall the issue of the Trade-A-Plane you consulted?

A. No, I don't. They come out 3 times a month.

Q. What kind of information did you get from the Trade-A-Plane?

A. We took an average from the Trade-A-Plane and figured how much a float ship of that kind would cost in the states.

Q. New or used? A. Used.

Q. And does that \$3,000.00 figure, does that represent an average of the figures you extracted from the Trade-A-Plane? A. Yes, it does.

Q. You recall whether or not that issue of the Trade-A-Plane—when you consulted that issue of the Trade-A-Plane?

A. We looked at it before the accident. I always look at it.

Q. Would you roughly state how long before the accident you looked at it?

A. It comes out 3 times a month and I looked at it—every one of them.

Q. Did you take the average of several issues then?

A. Yes, because we were thinking of selling it.

Q. What kind of arrangement did you have with Jess Bachner with respect to this salvage, if any?

(Testimony of Dean Phillips.)

A. It was just stored there and after the accident when Mr. Heay seemed to have trouble paying it up, I talked to Mr. Heay about selling the stuff so that we could get some of our money out of it and he agreed that if Mr. Bachner could sell, let him go ahead. It wasn't doing anybody any good where it was.

Q. To whom was Mr. Bachner going to account for the proceeds of these sales?

A. Well, he was going to tell me about it for one.

Q. Were you going to get the money?

A. I was not.

Q. Who was going to get it?

A. I was going to hand it to my lawyer.

Q. This was after the suit was commenced?

A. It was before suit was commenced.

Q. When did you retain Mr. McNabb as counsel?

A. I don't remember the exact date.

Q. But the money was to be turned over to your attorney, is that correct?

A. To hold until this thing (interrupted).

Q. When did you make that arrangement with Mr. (interrupted).

A. I don't remember the exact date.

Q. Would you recall whether or not that was before the [119] 1st of November, 1950?

A. No, I don't believe it was. I am not sure.

Q. Sometime after the 1st of November, 1950?

A. I think it was. I am not sure.

Mr. Boggess: I have no further questions at this time, your Honor.

(Testimony of Dean Phillips.)

Mr. Parrish: If the Court please, I omitted to ask Mr. Phillips about the pictures that we offered as identifications. I am not sure whether he took them or Mr. Kelly took them and I would like permission to ask him about the pictures we have.

The Court: Very well.

Direct Examination

(Continued)

By Mr. Parrish:

Q. Mr. Phillips, I hand you plaintiffs' identifications 2, 3, 4, 5 and 6 and ask you if you know what those are? A. Yes, I do.

Q. Will you state what they are?

A. They're pictures of (interrupted).

Q. Are they photographic pictures?

A. Photographic pictures.

Q. Of what?

A. Of a Super Cruiser—Piper Super Cruiser, 3803 Mike.

Q. And when were they taken?

A. They were taken approximately the 23rd or 24th of [120] September.

Q. What year? A. 1950.

Q. What Super Cruiser appears in those pictures?

A. It's the one that Mr. Heay borrowed from us to fly to Paxson and Tango.

Q. Did you take the pictures? A. I did.

Q. With what kind of a camera did you take those pictures?

(Testimony of Dean Phillips.)

A. Speedgraphic, four by five.

Q. What time of the day did you take the pictures? A. It was approximately noon.

Q. Who developed the pictures?

A. Wyman's Photo Service.

Q. Do these pictures fairly represent what you took with your camera? A. It does.

Mr. Parrish: We offer them in evidence.

Mr. Bogges: I will object to their introduction, your Honor, because there is no showing that the aircraft was in that position immediately after the accident. This man doesn't know. He says he wasn't there until the 23rd.

The Court: Objection overruled, may [121] be admitted.

Clerk of the Court: Identification 2 is plaintiffs' exhibit "C"; identification 3 is plaintiffs' exhibit "D"; identification 4 is plaintiffs' exhibit "E"; plaintiffs' identification 5 is "F" and 6 is "G."

(Plaintiffs' Identification No. 2 was offered into evidence and received and marked Plaintiffs' Exhibit "C.")

(Plaintiffs' Identification No. 3 was offered into evidence and received and marked Plaintiffs' Exhibit "D.")

(Plaintiffs' Identification No. 4 was offered into evidence and received and marked Plaintiffs' Exhibit "E.")

(Testimony of Dean Phillips.)

(Plaintiffs' Identification No. 5 was offered into evidence and received and marked Plaintiffs' Exhibit "F.")

(Plaintiffs' Identification No. 6 was offered into evidence and received and marked Plaintiffs' Exhibit "G.")

Mr. Parrish: No further questions, your Honor.

Recross-Examination

By Mr. Boggess:

Q. When to the best of your recollection, Mr. Phillips, [122] did the subject of salvage first come up at any conversation with Doug Heay?

A. Well, after the engine was brought down from the accident.

Q. And when was the engine brought down from the accident?

A. Oh, I don't know. Sometime within a week or week and a half after the accident. I don't recall the exact date.

Q. You say a week to a week and a half after the accident?

A. To the best of my recollection. I don't remember exactly when it was.

Q. That would make it after you had taken those pictures in question? A. That's right.

Q. Didn't you state on cross-examination—on direct examination that you didn't know what the condition of salvage was on that aircraft at the time

(Testimony of Dean Phillips.)

you discussed it with Doug? A. That's right.

Q. Why didn't you know if you were up there taking pictures?

A. I didn't take the cowl off the engine. It looked like it was smashed. You would have to have some tools to get it off and I didn't have any. I didn't go up there to pick on the airplane.

Q. There wasn't any salvage except the engine from your observations without taking the cowling off?

A. I didn't even know if the engine was salvagable. [123]

Q. You didn't look?

A. I didn't look because we didn't have any tools to get it off.

Mr. Boggess: No further question, your Honor.

Mr. Parrish: That's all.

(At this time, Mr. Dean Phillips left the witness stand.)

The Court: We will take a ten minute recess.

(At this time, a short recess was taken and thereafter the trial of this cause was resumed.)

The Court: Counsel ready to continue?

Mr. McNabb: Ready, your Honor.

Mr. Boggess: Defendant is ready, your Honor.

The Court: Very well.

Mr. McNabb: May it please the Court, at this time, we have one witness—one more witness here,

your Honor, and I was wondering if after he finishes testifying if we could recess for the day. I make that request to the court for two reasons. Number one, our next witness is a gentleman who will require far more time when we get him on the stand until time for adjournment this evening which would necessitate calling him away from work today and [124] tomorrow. The second reason is Mr. Parrish is anxious to leave this evening for Anchorage. He is flying down there this afternoon, so if it would be convenient for the court, I would like to put this one remaining witness on and recess until tomorrow morning.

The Court: Any objection?

Mr. Boggess: I have no objection.

The Court: Very well.

FLOYD JAMES

called as a witness in behalf of the Plaintiffs, having been first duly sworn, testified as follows:

Direct Examination

By Mr. McNabb:

Q. Will you state your name, please?

A. Floyd James.

Q. Where do you reside, Mr. James?

A. 312-4th Avenue.

Q. In what city? A. Fairbanks.

Q. What is your occupation, Mr. James?

A. Shovel operator.

Q. Are you acquainted with Mr. Doug Heay

(Testimony of Floyd James.)

who is seated here? A. I have met him. [125]

Q. Have you ever had any business dealings with Mr. Heay? A. Yeah.

Q. And what were those? What was the nature of that transaction that you had with Mr. Heay?

A. I bought a set of skis from him.

Q. And did you have any conversation with Mr. Heay concerning skis?

A. Well, I called him up and asked him—I said, “I hear you have a set of skis for sale” and he says “Yes.”

Q. When did that conversation take place?

A. That was in October, towards the last part of October.

Q. Of what year? A. Last year.

Q. And where did you call him?

A. At his home.

Q. And what did Mr. Heay say to you?

A. Yes—he said yes he did have a set of skis for sale.

Q. And was there any further conversation between you and Mr. Heay?

A. Well, he said they were up at Phillips’ basement and to go up there and look at them. I went up and looked at them and went back and bought them.

Q. Did Mr. Heay tell you how much he wanted for the skis? A. \$150.

Q. And did you pay him for them? [126]

A. Yes, sir.

(Testimony of Floyd James.)

Clerk of the Court: Plaintiffs' identification number 8.

(At this time, a check dated October 25, 1950, payable to Douglas Heay, was introduced and marked as Plaintiffs' identification No. 8.)

Q. (By Mr. McNabb): Mr. James, I will show you plaintiffs' identification 8 and ask you if you know what that is?

A. It's the check I paid for the skis.

Q. Wait a minute, now. Would you turn that over? To whom is that check payable?

A. Douglas Heay.

Q. And whose signature is on it?

A. L. Floyd James.

Q. Who is L. Floyd James?

A. That's me.

Q. Will you turn that check over on the back, please? Whose endorsement is—is there any endorsement on that check?

A. Yes, Douglas Heay.

Q. And did you deliver that check to Mr. Heay?

A. Yes, sir.

Q. And for what did you deliver it to him?

A. For a set of skis. [127]

Q. Do you know where he got those skis?

A. Yes, sir.

Q. Where did he get them?

A. From an airplane that Phillips had.

Mr. McNabb: I will offer this check in evidence, your Honor, at this time.

(Testimony of Floyd James.)

Mr. Boggess: I have no objection.

The Court: May be admitted.

Clerk of the Court: Plaintiffs' exhibit "H."

(At this time, Plaintiffs' identification No. 8 was offered in evidence and received and marked as Plaintiffs' Exhibit "H.")

Mr. McNabb: That's all.

Cross-Examination

By Mr. Boggess:

Q. How did you learn that Doug Heay had skis for sale? A. I heard it out at the field.

Q. Do you recall who told you out at the field?

A. No, I don't, just airplane talk, you know. I heard Doug Heay had a set of skis for sale.

Q. Do you know whether your wife had previously called Mrs. Heay?

A. Yes, she had and she asked to have him call me back. [128]

Q. Now, when—where did you say these skis were? A. They were at Phillips' basement.

Q. Did you go out to Dean Phillips at that time?

A. I went out and looked at the skis, yes.

Q. And who told you to go to Dean Phillips to look at the skis?

A. Doug Heay told me they were out there.

Q. And did you have any conversation with Phillips at that time as to the value of the skis?

A. I told him what Doug Heay wanted for them.

(Testimony of Floyd James.)

Q. And what did he say when you (interrupted).

A. He said he's buying the plane, it's up to him.

Q. Did he make any comments that he thought that was an unreasonable amount?

A. No, sir.

Q. Do you recall having conversed with Doug Heay at any time when Doug told you that Phillips would set the price on the skis?

A. No, sir.

Q. And before you went out to see Phillips, did you know what the price of the skis were going to be?

A. I asked Doug Heay how much he wanted for them.

Q. How much did he say? A. \$150.

Mr. Boggess: That's all. [129]

Mr. McNabb: That's all.

(At this time, Mr. Floyd James left the witness stand.)

The Court: You wish to adjourn until the morning?

Mr. McNabb: Yes, your Honor, if we may, please.

The Court: Very well, until tomorrow morning, Mr. Clerk.

Clerk of the Court: Court is adjourned until 10 o'clock tomorrow morning.

(At 4:10 o'clock p.m., the trial of this cause was adjourned until 10 o'clock a.m., May 9th, 1951.)

Be It Remembered, that upon the 9th day of May at the hour of 10 o'clock a.m., the trial of this cause was resumed, plaintiffs and defendant represented by counsel, the Honorable Harry E. Pratt, District Judge, presiding:

The Court: Counsel ready to proceed with this trial?

Mr. Boggess: Ready, your Honor.

Mr. McNabb: Ready, your Honor.

The Court: Very well, proceed. [130]

Mr. McNabb: Mr. Clerk, will you swear this witness, please?

JESS G. BACHNER

called as a witness in behalf of the Plaintiffs, having been first duly sworn, testified as follows:

Direct Examination

By Mr. McNabb:

Q. Will you state your name, please?

A. Jess G. Bachner.

Q. How do you spell that?

A. B-a-c-h-n-e-r.

Q. Where do you reside, Mr. Bachner?

A. Fairbanks, 1010-9th.

Q. How long have you resided in Fairbanks?

A. Thirty-two years.

Q. What is your occupation, Mr. Bachner?

A. Aircraft mechanic.

Q. How long have you been an aircraft mechanic?

(Testimony of Jess G. Bachner.)

A. I have been working on airplanes for approximately 6 years and I have had my license for 3 years.

Q. Now, what type of license is that that you had for 3 years?

A. A and E, aircraft and engines.

Q. And by whom are you licensed? [131]

A. Civil Aeronautics Administration.

Q. And what is necessary, Mr. Bachner, to get such a license?

A. You're required to have two years practical experience plus passing their regular examination—written examination.

Q. Did you take that examination?

A. I did.

Q. When did you take the examination?

A. I will have to look and see. Ninth month, 13th day, 1948.

Q. And what was the outcome of that examination, Mr. Bachner?

A. I have the certificate here.

Q. And you are licensed as an aircraft mechanic, is that correct?

A. Aircraft and engine mechanic.

Q. And have you engaged actively in that occupation since the time that you received your license?

A. Yes, I have.

Q. Now, are you in business, Mr. Bachner?

A. Yes.

Q. And under what name do you do business?

A. Fairbanks Air Service.

(Testimony of Jess G. Bachner.)

Q. And where is your place of business?

A. Weeks Field. [132]

Q. Is that adjacent to Fairbanks?

A. That's in Fairbanks, yes.

Q. Now, Mr. Bachner, are you a licensed pilot?

A. Yes, I have airplane single engine land, airplane single engine sea and airplane multi-engine land.

Q. Where did you take your instruction, Mr. Bachner? A. At the Fairbanks Air Service.

Q. And when did you commence your instruction? A. 1944.

Q. When did you receive your license as a private (interrupted). A. December 15, 1945.

Q. And by whom was that license issued?

A. D. M. Gretzer, C. A. A. airman inspector.

Q. What do the initials C. A. A. represent?

A. Civil Aeronautics Administration.

Q. And have you been—has that license ever been revoked, Mr. Bachner?

A. No, it has not.

Q. Has it ever been suspended?

A. No, it has not.

Q. Is it at this time in full force and effect?

A. Yes, it is.

Q. For single engine land? A. Yes. [133]

Q. For single engine sea? A. Yes.

Q. And multi-engine land? A. Yes.

Q. You have those licenses then in force at this time, all of them? A. Yes, I do.

Q. You were licensed in what year?

(Testimony of Jess G. Bachner.)

A. 1945.

Q. In all of those types of—for all of those purposes?

A. No. That was just for the private license for single engine land.

Q. When did you receive your license for single engine sea? A. 1949.

Q. And when did you receive your license for multi-engine land? A. 1949 also.

Q. Now, Mr. Bachner, have you been flying continuously since your single engine land license was issued? A. Yes, I have.

Q. And how frequently have you operated an aircraft since your single engine land license was issued?

A. Well, I would say that there's never been more than a week gone by that I haven't flown.

Q. Do you have the log books showing the hours which you [134] have accumulated in these various types of aircraft? A. Yes, I do.

Q. Do you know now what those logs state?

A. No, offhand I couldn't say.

Q. Have you recorded all of the hours which you have spent flying?

A. No, no where near all of them.

Q. Well, can you state approximately how many hours you have in single engine land type aircraft?

A. I would say in the vicinity of 500.

Q. Now, could you state how many hours total flying time that you have?

A. Oh, it would be upwards of 650.

(Testimony of Jess G. Bachner.)

Q. That is, since your initial license was first issued, is that right? A. That's right.

Q. How many hours' instruction have you had, Mr. Bachner, in those various types of aircraft?

A. I had approximately 15 hours in single engine land and about 5 hours single engine sea and 11 hours in multi-engine land.

Q. Now, you stated that at no time have any of those licenses been suspended (interrupted).

A. No, they haven't.

Q. Or revoked? [135] A. No.

Q. Mr. Bachner, have you ever, while operating an aircraft, have you ever crashed? A. Yes.

Q. What was the nature of that accident?

A. Well, it was right on the home field.

Q. And was the cause for that accident determined? A. Yes.

Q. What was the cause of that accident?

A. Well, my own fault.

Q. When did that occur—when did that accident occur?

A. I think it was in '47. I couldn't—can't remember for sure.

Q. Your license was issued in 1945?

A. Yes.

Q. What is your principal occupation now, Mr. Bachner? A. Aircraft mechanic.

Q. And you operate a business of repairing aircraft, do you? A. Yes.

Q. Do you overhaul motors?

A. Yes, we do.

(Testimony of Jess G. Bachner.)

Q. What is your principal business, Mr. Bachner? That is, do you do more work in one particular field of aircraft mechanics than any other? [136]

A. No, it's just an overhaul shop, takes care of everything.

Q. Mr. Bachner, did you make a trip from Fairbanks, Alaska, to Paxson Lake—are you acquainted with Douglas Heay? A. Yes.

Q. Did you make a trip from Fairbanks, Alaska, to Paxson Lake with Mr. Heay last September?

A. No, not with him.

Q. Do you know whether Mr. Heay made a trip from Fairbanks, Alaska, by airplane to Paxson Lake last September?

A. I met Mr. Heay at Paxson Lake myself. He was there. I don't know how he got there, whether he flew or rode.

Q. But you did not fly to Paxson Lake with Mr. Heay, is that right? A. No, I did not, no.

Q. Now, on the morning of the 20th day of September last year, did you make a flight with Mr. Heay? A. Yes.

Q. Now, what airplane were you flying at that time? Who was operating that aircraft?

A. Mr. Heay.

Q. Do you know what airplane that was?

A. Yes, it was a Super Cruiser. I don't recall the number of it offhand.

Q. Do you know to whom the plane belonged?

A. Yes. [137]

Q. To whom did it belong?

(Testimony of Jess G. Bachner.)

A. It belonged to Dean Phillips and Charles Gray and Mr. Kelly.

Q. Did you ever have an occasion to work on that plane? A. Yes, we had.

Q. Were you familiar with it? A. Yes.

Q. How many hours have you worked on that airplane?

A. We just finished a complete major overhaul on the engine and installed the floats and relicensed the airplane which amounted to approximately \$750 worth of work.

Q. Now, Mr. Bachner, how long before this flight that you made with Mr. Heay did you do the work on that airplane?

A. Approximately three months.

Q. Do you know how many hours had been put on the plane between the time you made that overhaul and the date on which you made the flight with Mr. Heay? A. No, I don't.

Q. Now, you say the plane was relicensed. What do you mean it was relicensed?

A. An aircraft is required to have a thorough inspection throughout and relicensed once a year by the Civil Aeronautics Administration.

Q. What is necessary to be done to have a license reissued?

A. Any work found necessary to be done by the inspecting [138] mechanic.

Q. In this instance, who was the inspecting mechanic? A. Myself.

(Testimony of Jess G. Bachner.)

Q. Are you authorized by the C. A. A. to make those inspections? A. Yes, I am.

Q. And after the inspection, what did you do as an inspector? What are your duties after having made an inspection like that?

A. Well, you have to have work done on the airplane complying with anything you find wrong with it. You make out the usual forms.

Q. You inspected that aircraft, did you?

A. That's right.

Q. Do you recall what month you inspected it?

A. No, I don't.

Q. Do you recall what you found necessary to be done to that aircraft?

A. No, offhand I don't.

Q. Do you know what—whether anything was done to the aircraft to comply with your findings as an inspector? A. I couldn't say now.

Q. Do you know what work was done on that plane?

A. The engine was major overhauled as I said and the floats installed.

Q. Was any other work done to the [139] engine? A. No.

Q. Do you know the horsepower of that engine?

A. Yes.

Q. What was it? A. 115 horsepower.

Q. Had that engine always been a 115 horsepower engine? A. No.

Q. What had it previously been?

A. One hundred.

(Testimony of Jess G. Bachner.)

Q. Now, do you know who converted it from 100 to 115? A. Yes.

Q. Who did, Mr. Bachner? A. I did.

Q. What did you do to convert it?

A. You put in factory required parts for the conversion which amounts to a cam shaft and certain type cylinder.

Q. Did you do that work? A. Yes.

Q. What effect did the conversion from 100 to 115 horsepower engine have on the operation of that aircraft?

A. It increased the performance considerably.

Q. Did it increase the value of the aircraft?

A. Yes, it did.

Q. Was that plane relicensed?

A. Yes. [140]

Q. You say you do not recall when you made the inspection? A. No, I don't.

Q. Do you recall how long it took you to make this major overhaul on the plane?

A. No, I don't.

Q. You say you installed floats on the plane?

A. Yes.

Q. What were—what was the value of the floats?

A. \$1,200.00.

Q. How do you arrive at that figure?

A. That's the going figure that we get out of Trade-A-Plane. That's what we judge everything by. It's a national airplane paper which is issued twice monthly.

(Testimony of Jess G. Bachner.)

Q. Did you consult that publication to determine that value? A. Yes.

Q. Do you know what—do you now know the make of floats which was installed on that plane?

A. Yes.

Q. What was that? A. Edo.

Q. And you found quotations in Trade-A-Plane for that particular type of float? A. Yes.

Q. Is that the new price? [141]

A. No, that would have been at that time considering a differential for freight from the states to here.

Q. Now, was—were they new floats you put on that plane? A. No, they weren't.

Q. And in consulting this publication, did you take into consideration the condition of those floats at the time you put them on there? A. Yes.

Q. What would you say the condition of those floats were? A. Good.

Q. Now, at the time that you made this flight with Mr. Heay on the 20th of September, can you state as a mechanic and inspector your opinion as to the value of that airplane?

A. Well, as I say, according to Trade-A-Plane which is what we used for valuing anything of that sort, it is worth approximately \$3200 in the condition it was in.

Q. That is on the 20th day of September?

A. Yes.

Q. Now what—how did you arrive at that figure of \$3200?

(Testimony of Jess G. Bachner.)

A. We took an average of the prices of the same aircraft, the same year and model and approximately the same equipment on it.

Q. Well now, what equipment do you have reference to?

A. Oh, instruments and radio and things like that.

Q. Did that airplane have skis? [142]

A. It was on floats then.

Q. Well now, when you say though that you placed a value of \$3200 (interrupted).

A. Oh, yes, the skis were included.

Q. They were included in the price?

A. Uh-huh.

Q. Were you familiar with the skis which (interrupted).

A. No, I wasn't. I know what type of ski they were and what they were worth but I didn't know the particular skis. I never worked on them or anything.

Q. Well now, do you know whether that—what did you remove from that aircraft and put the floats on it?

A. Wheel—landing gear and wheels.

Q. And in arriving at your \$3200 figure, did you also consider the landing gear? A. Yes.

Q. Did you find quotations in the Trade-A-Plane for aircraft of that type with 115 horsepower engine? A. No.

Q. Did you—what did you do in arriving at

(Testimony of Jess G. Bachner.)

your \$3200 figure to take that additional 15 horsepower into consideration?

A. We didn't consider it.

Q. You didn't consider it? A. No. [143]

Q. How did you arrive then at the \$3,200 figure?

A. We took an average of the aircraft as it is listed in Trade-A-Plane, added the floats and adding the skis to it and allowing a \$500 differential for transportation from the states to Alaska which is an average.

Q. Well now, what do you mean the \$500 differential is an average?

A. Well, that's—all the people in the field, that's the way they figure when they fly an airplane from the states. They figure at least \$500. They figure an average of a \$500 cost.

Q. Is that customary in Fairbanks?

A. Yes.

Q. Regardless of the type of aircraft?

A. No. That would be—the bigger of course the more it would cost but it wouldn't amount to very much. It would just be gasoline cost.

Q. Do you believe \$500 represents the—a true and accurate figure for the differential?

A. Yes.

Q. Is that—in Fairbanks, is that \$500 generally considered to be a reasonable price?

A. That's right.

Q. Now, did you in determining this \$3,200 price, did you—is that as of the 20th day of September? [144]

(Testimony of Jess G. Bachner.)

A. No, that would be as of today.

The Court: That would be what?

The Witness: As of today.

Q. (By Mr. McNabb): \$3,200?

A. The last issue of Trade-A-Plane I should say.

Q. When did you make these computations?

A. Oh, in the last week, but the price is virtually the same. It hasn't hardly changed. It has changed very little in the last 6 months.

Q. Did you make any computations in September of last year as to the value of that aircraft?

A. No.

Q. Do you know what the Trade-A-Plane publication said about the value of that particular aircraft last September? A. No.

Q. Do you know the general fluctuations in the value of aircraft of that nature? A. No.

Q. You don't know that that airplane was worth \$3,200 in September or October or August of last year? A. No, not positively.

Q. Well, what is your opinion?

A. I think it was, yes.

Q. How do you arrive at that opinion, Mr. Bachner? [145]

A. Well, just from reading that Trade-A-Plane every time I get an issue and study it pretty carefully through everything, not only in that type of airplane but everything else and just over a period of time it just seems to me that that's right.

Q. How long have you been familiar with this publication, Trade-A-Plane?

(Testimony of Jess G. Bachner.)

A. Oh, about 5 years—6 years.

Q. And how frequently do you read it?

A. It is issued every 2 weeks.

Q. And do you read it every issue?

A. Yes.

Q. What type of aircraft work do you work on most, Mr. Bachner?

A. We work on all types under 7,000 pounds gross.

Q. Are you—are you particularly interested or is your work primarily on ships of the approximate size as the one under discussion today?

A. Yes.

Q. You are more familiar with that particular type of aircraft or small aircraft than you are with larger ones, is that right?

A. That's right; what is termed as light aircraft.

Q. And in your reading of Trade-A-Plane, do you pay more attention to smaller aircraft of the type of aircraft that [146] you work on?

A. That's right.

Q. Being familiar with that publication, would you say that \$3,200 figure which you base your value of that aircraft on at this time was approximately the same amount last year or last August?

A. Yes.

Q. Last September? A. Yes.

Q. Now, Mr. Bachner, where on the 20th day of September last year did you meet Mr. Heay?

A. At Paxson Lake.

(Testimony of Jess G. Bachner.)

Q. And did you go aboard the aircraft belonging to Dean Phillips with Mr. Heay? A. Yes.

Q. Was anyone else present in that airplane at that time? A. Yes.

Q. Who else was present?

A. Ernest Hubbard.

Q. And now, was that plane on wheels or floats at that time? A. Floats.

Q. Was it on the lake proper?

A. Yes.

Q. Now, what did you do after you got into that plane with [147] Mr. Heay and Mr. Hubbard? What did Mr. Heay do?

A. Well, we tried to take off and we couldn't make it so (interrupted).

Q. Well now, what do you mean you tried to take off? A. Tried to fly.

Q. Which direction did you go that time?

A. We started out in a southerly direction as I remember.

Q. And were you able to take off in that direction? A. No.

Q. What did Mr. Heay do then?

A. We came back and let Mr. Hubbard out.

Q. At what particular place did you let Mr. Hubbard out? A. At the Sportsman's Lodge.

Q. Is that the place you took off from originally? A. Yes.

Q. And then what did you do?

A. We tried to take off again.

(Testimony of Jess G. Bachner.)

Q. Do you know why you weren't able to take off the first time? A. Yes.

Q. Why were you unable to take off?

A. Because we had too much load for the amount of wind we had at that altitude.

Q. Now then, after you let Mr. Hubbard out of the aircraft, what did you do? [148]

A. We took off.

Q. Did you take off in the same direction?

A. No. As I remember, we took off to the north at that time.

Q. Were you able to get off that time?

A. Yes.

Q. Now, when you first tried to get off, was there any wind blowing, Mr. Bachner?

A. Very little.

Q. Do you recall the direction from which it was coming? A. No, I don't positively.

Q. Well, is it customary to take off into the wind? A. Yes, it is.

Q. And you started to take off in which direction first? A. South.

Q. And you weren't able to get off?

A. No.

Q. Is it reasonable to assume that you tried to take off into the wind on the first time?

A. Yes, it could be because the wind changes.

Q. Then in your opinion then, it was—would you have been taking off into the wind when you tried to take off south the first time?

(Testimony of Jess G. Bachner.)

A. We should have been. I didn't pay any attention to it myself. [149]

Q. Well now, you came back and after you let Mr. Hubbard out you took off in which direction?

A. North.

Q. Do you know whether you took off into the wind that time? A. I couldn't say, no.

Q. Is it customary to take off into the wind?

A. Yes.

Q. So if the normal procedure were followed, you took off into the wind that time?

A. That's right.

Q. Which means if normal customary procedure were followed in taking off, the wind had shifted by the time you started to take off first and when you let Mr. Hubbard out and tried to take off the second time? A. That's right.

Q. Now, as a mechanic and while you were taxiing and taking off, in your opinion was the motor in that airplane operating properly?

A. Yes, it was.

Q. Do you know whether the controls in the airplane were operating properly?

A. I think they were.

Q. Did it seem to respond to Mr. Heay's (interrupted). A. Yes. [150]

Q. (Continuing): Command? Now, you say you took off in a northerly direction. What did Mr. Heay do after he got the airplane airborne?

A. Well, we just started climbing.

(Testimony of Jess G. Bachner.)

Q. Do you know how rapidly you were climbing? A. No, I couldn't say.

Q. Do you know how fast you were flying?

A. No.

Q. Was the airplane laboring? A. No.

Q. Was it in a normal climb for that type of aircraft? A. I would say so, yes.

Q. Now, Mr. Bachner, I would like you to come down and look at this map. You say you took off in a northerly direction? A. That's right.

Q. Now, after you became airborne, what did you do or what course did that airplane follow?

A. Well as I remember, we went north along the east shore of the lake and made a 180 degree turn and came back along the west shore until the airplane went out of control.

Q. Did you come back down the lake and make a circle over the lake?

A. Not that I remember.

Q. Do you know whether you made a 360 degree turn over [151] that lake at any time?

A. Not that I can remember.

Q. Then after you took off, you didn't make any complete circle? A. I can't recall any.

Q. Well, have you attempted to refresh your memory at any time since that accident occurred as to exactly the course that was followed by that aircraft? A. No, I haven't.

Q. How much altitude—how far did you fly before you started toward the hills? How long had

(Testimony of Jess G. Bachner.)

you been in the air before you left the water—you got the airplane airborne but you stayed over the lake for a period of time, didn't you?

A. That's right.

Q. Now then, how long did you fly actually over the water before you headed—made this turn and headed for those hills?

A. Oh, I would say four to five minutes.

Q. You stayed over the water that long?

A. That's including the take-off, too.

Q. Now, when you say including take-off, do you mean the time you were taxiing? A. No.

Q. After the aircraft was actually [152] airborne? A. Yes.

Q. How fast does that plane fly, Mr. Bachner?

A. Well, at that altitude, it should have been flying about 70-75 miles an hour.

Q. Well now then, how long did you fly down that lake before Mr. Heay started this turn?

A. I couldn't say.

Q. Do you know how many miles you traveled down that lake? A. No, I don't.

Q. Do you know whether or not he got out on over the shore of the lake at the north end?

A. I don't believe so.

Q. You think he stayed on the lake all the time?

A. I think so.

Q. Was he continuing to climb that aircraft?

A. Yes.

Q. Do you recall that he made a 180 degree turn or thereabouts and came back down the lake?

(Testimony of Jess G. Bachner.)

A. Yes.

Q. Now, did he make a full 180 degree turn, Mr. Bachner?

A. No, I don't think so. It would have been about a 170 or 165 or a 170 degree turn.

Q. Do you know approximately how many ground miles you traveled from the time you got off the lake until you came [153] back over the lake and then started for the hills?

Mr. Boggess: I will object to that, your Honor, because this witness couldn't possibly determine the number of ground miles that was travelled, I don't believe.

The Witness: That's right.

The Court: Well, he can answer it. Objection overruled.

Q. (By Mr. McNabb): Well now, can you estimate the number of ground miles you traveled?

A. No, I wouldn't attempt to.

Q. But you know you were in the air 4 or 5 minutes, is that right? A. Yes.

Q. Now then, you headed toward the hills, is that correct? A. Not directly, no.

Q. Approximately what angle were you approaching those hills, Mr. Bachner?

A. Oh, as I remember, we had been approaching the hill at about a 40, 45 degree angle.

Q. Would you step down here again please, Mr. Bachner. Does the blue line which you see on this map marked from the point "X" to the point

(Testimony of Jess G. Bachner.)

double "X" truly represent the ridge of that hill toward which you were flying?

A. The general angle, yes, I would say so. [154]

Q. Does this blue line approaching the ridge of the hill from the northerly edge of the lake truly represent the angle at which that aircraft was approaching the ridge of the hill?

A. Yes, I would say so.

Q. That you believe appears to be a 45 degree angle? A. That's right.

Q. Now, Mr. Bachner, do you know approximately how much altitude that the airplane had as it left the lake? How high was it over the lake?

A. I would judge it to be approximately a thousand feet above the water.

Q. Was that below the ridge of the hill?

A. Yes.

Q. And you continued to approach the hill at approximately a 45 degree angle? A. Yes.

Q. How fast—do you know how fast the airplane was flying at that time?

A. No, I don't.

Q. Was it climbing?

A. I think so, slightly.

Q. Now then, as you approached the hill, what happened, Mr. Bachner?

A. Well, everything was normal in the airplane and it just [155] quit flying. It just went out of control.

Q. What happened when it went out of control?

A. It hit the ground.

(Testimony of Jess G. Bachner.)

Q. Well, what did Mr. Heay do when that airplane quit flying?

A. The only thing I could see him do is open the throttle wide open immediately.

Q. The plane had been flying then at something other than full throttle? A. That's right.

Q. Now, when the plane went out of control, approximately how much altitude did you have? How high above the hills at that particular place were you?

A. Well, I would say it was four to five hundred feet above the ground.

Q. And how close to the hills were you as you were approaching it?

A. Well, at the angle that hill is, between 800 to a 1000 feet.

The Court: I couldn't understand that.

The Witness: Between 800 and a 1000 feet.

Q. (By Mr. McNabb): Mr. Bachner, do you recall whether there was any wind [156] that day?

A. I think there was a slight wind, yes.

Q. Do you know which direction it was coming from? A. No, I couldn't say.

Q. Was the plane—did you notice any turbulence that—after it become airborne and started to approach the hill?

A. No, not any severe turbulence, no.

Q. Well, was the plane bouncing any?

A. Oh, I can't remember that good.

Q. Do you know what caused that aircraft to go out of control?

(Testimony of Jess G. Bachner.)

A. I would say it was a down current of air,

Q. Was the motor functioning properly when it went out of control? A. Yes, it was.

Q. Did it continue to function properly?

A. Yes, it did.

Q. Now, exactly what did Mr. Heay do other than put on more throttle?

A. I don't know. The only thing I had to look at was the back of his shirt.

Q. What did the airplane do?

A. It went right straight to the ground nose first.

Q. Nose first? After you started to fall, did you recover? Did you recover any at all? [157]

A. No.

Q. Could you tell from Mr. Heay's actions whether he was attempting to recover?

A. I would say he was.

Q. Do you know whether he was successful or not in making any recovery at all?

A. I don't think so.

Q. Did you feel the airplane take hold any?

A. No.

Q. Did Mr. Heay make any turns? Did the aircraft—that is, did the aircraft turn any?

A. It made a slight turn, yes.

Q. Which direction was that turn made?

A. To the right or into the hill.

Q. A turn into the hill? A. Yes.

Q. It didn't turn down the hill?

A. No.

(Testimony of Jess G. Bachner.)

Q. Well now, turning into the hill, would you have had more or less altitude or more or less distance to travel than when that plane started flying?

A. We had less.

Q. Do you know whether the wind could have turned you into that hill?

A. Yes, it could have.

Q. Do you know whether the wind turned you into that hill, [158] Mr Bachner?

A. No, I don't.

Q. Mr. Bachner, do you know whether wind currents of that type are normal in mountainous country? A. Yes, they are.

Q. What could Mr. Heay have done to have recovered from—was there anything he could have done to have recovered the control of that airplane?

A. No, I don't think so.

Q. Have you had any experience in flying in that type of country, Mr. Bachner? A. Yes.

Q. Have you had occasion to discuss flying in that type of country with other pilots?

A. Yes.

Q. Do you know the general procedure in flying in that type of country? A. Yes.

Q. Do you know, Mr. Bachner, what is done by pilots who fly in that type of country to prevent the very thing which occurred that day?

A. Well, no two pilots fly alike and some pilots are extra cautious and some are—well, they take chances and some just go along normally and go

(Testimony of Jess G. Bachner.)

half way one time and half way the other time so it is pretty hard to say. [159]

Q. Do you think that Mr. Heay took a chance?

A. According to my flying standards, I would say so, yes.

Q. What do you believe he should have done?

A. Stayed more over the water out in the middle of the valley until he got enough altitude.

Q. You think he approached the hill with too little altitude? A. Yes.

Q. What do you think actually caused that airplane to strike the ground—crash to the ground?

A. A down current of air.

Q. In the event that you had had more altitude, would you have had more opportunity to have recovered? A. Possibly.

Q. In your opinion, Mr. Bachner, how much altitude should Mr. Heay have had before he approached those hills?

A. I always cross them at least a thousand feet above the crest of the hill.

Q. And at the time you approached those hills, you were considerably under the crest of the hill, were you not? A. That's right.

Q. Mr. Bachner, I will show you plaintiffs' exhibit "A" and ask you if you know what that is?

A. That's the hill, Paxson Lake.

Q. Now, do you see there an ink spot on that photograph? [160] A. Yes, I do.

Q. Does that represent the approximate location of the spot at which that airplane crashed?

(Testimony of Jess G. Bachner.)

A. Yes, it does.

Q. Now, did you—I will hand you plaintiffs' exhibits "B" through "G" and ask you if you know what they are please. Do you know what those are, Mr. Bachner?

A. Yes, I do.

Q. Well now, do they truly represent the condition of that aircraft after it had crashed?

A. I would say so.

Q. Well, do you recall having seen that aircraft after it struck the ground?

A. I didn't look at it very good. We got out of it.

Q. Had you ever seen it since that time?

A. No, I haven't.

Mr. McNabb: Your Honor, may we have a recess at this time?

The Court: Yes, we will take a ten minute recess.

(At this time a ten minute recess was taken and thereafter the trial of this cause was resumed.)

(Mr. Jess Bachner resumed the witness stand.)

The Court: Counsel ready to proceed [161] with the trial of this case?

Mr. McNabb: Yes, your Honor.

Mr. Boggess: Yes, your Honor.

The Court: Very well.

Q. (By Mr. McNabb): Mr. Bachner, during the time that airplane was approaching those hills,

(Testimony of Jess G. Bachner.)

was it laboring? A. No, I wouldn't say so.

Q. What—do you know what the normal rate of climb for that plane is?

A. I would say 70 miles an hour is a good safe rate of climb.

Q. And at—how many feet per minute?

A. Well, that should give you about 300 feet a minute.

Q. Do you know whether it was in that attitude prior to the time you struck the (interrupted).

A. I don't know.

Q. (Continuing): Current of air? Do you know how much you weighed on the 20th of September, 1950? A. Yes, I do.

Q. How much did you weigh?

A. Approximately 210 pounds.

Q. Was the plane overloaded?

A. No, I wouldn't say so.

Mr. McNabb: That's all the questions [162] I have.

Cross-Examination

By Mr. Boggess:

Q. Jess, do you remember how many hours were on Phillips' plane at the time of your major overhaul? A. No, I don't.

Q. Do you know whether or not the Civil Aeronautics Administration requires overhauls to be made after a certain amount of hours have been flown? A. They do not on a private airplane.

Q. Only on commercial aircraft?

(Testimony of Jess G. Bachner.)

A. That's right.

Q. Now, would you state again, Jess, what the cost of this major overhaul together with the engine conversion amounted to?

A. I would say approximately \$750.

Q. Did you do that work? A. Yes.

Q. Do you remember what you billed the clients for that work? A. No, I don't.

Q. Now, how much of that work—would would be the cost of the reconversion without the overhaul?

A. Well, you have to tear the engine down completely to [163] make the conversion. Therefore, we have never converted one without overhauling it.

Q. Is there any way you can make an estimate of the separate cost of converting without overhauling? A. No.

Q. You have referred to the Trade-A-Plane quite often on direct examination, Jess. Do you have, you say, past issues of the Trade-A-Plane?

A. Yes.

Q. Do you have all the past issues of the Trade-A-Plane for the past say 3 years? A. No.

Q. You do not? A. No.

Q. How long have you been saving issues of the Trade-A-Plane?

A. Oh, I probably have three or four back issues now.

Q. Three or four back issues. Now you say you arrived at the approximate value of \$3,200 for an

(Testimony of Jess G. Bachner.)

aircraft of this type, float equipped and with ski accessory and landing gear, is that right?

A. That's right.

Q. By examining the most recent issues of the Trade-A-Plane, is that right?

A. That's right. [164]

Q. Do you recall, Jess, how many planes you found of this particular make and with these accessories in the last issue of the Trade-A-Plane?

A. I think there was about 8.

Q. There were about 8? Now, as I understand it, the Trade-A-Plane lists types of aircraft separately, is that correct?

A. That's correct.

Q. Now, if you were looking for a float plane of a particular type of aircraft, would you look under the column headed by that type of aircraft or would you look elsewhere in the Trade-A-Plane.

A. You would look elsewhere.

Q. And where would you look?

A. Under the column float equipped aircraft?

Q. And did you find 8 float equipped aircraft of this type in the last issue of the Trade-A-Plane?

A. No.

Q. How many did you find, Jess?

A. I don't recall ever looking in the float equipped section.

Q. Well then, how did you arrive at a figure of \$3200 without consulting the float section of the Trade-A-Plane?

A. I took the price of the aircraft itself and

(Testimony of Jess G. Bachner.)

added the price of the—going price of the floats plus the price of [165] the skis.

Q. Now, was that price of the floats and skis new or used? A. Used.

Q. The Trade-A-Plane as a matter of fact just lists used items, isn't that correct?

A. That's correct.

Q. You think that is a fair method of valuation, Jess? A. I think so.

Q. You do? Now, when you overhaul an engine, Jess, do you think that the aircraft is increased in value the amount of the overhaul or the cost of the overhaul? A. Yes.

Q. Whatever the labor cost of the overhaul is, you think the aircraft is increased that much in value, is that correct? A. That's right.

Q. Well, Jess, in your reading of the past issues of the Trade-A-Plane, would you be prepared to make an estimate of the value of that aircraft, that is its market value in the condition it was at the time of the accident without taking into consideration the accessories which were not on the aircraft at that time?

A. Will you state that again please?

Q. Well, what I am driving at is I would like to have your opinion of the market value of that aircraft according [166] to your perusal of the Trade-A-Plane at the time it was wrecked in the condition that it was in immediately prior to the time it was wrecked and without taking into con-

(Testimony of Jess G. Bachner.)

sideration these accessories which were not on the plane at that time?

Mr. McNabb: You Honor, I think that Mr. Boggess should state the particular items which he wishes excluded.

Mr. Boggess: Jess has already testified, your Honor, that he was conversant with the aircraft.

The Court: Objection overruled.

Q. (By Mr. Boggess): The aircraft just as it struck the ground without considering any other factors—just before it struck the ground.

A. Well, I would say it was worth \$3,000.

Q. Now perhaps you didn't understand me, Jess. You testified that the aircraft—the value of the aircraft taking into consideration the removed wheels and gear and the removed skis was \$3200.

A. Approximately.

Q. Now what I am asking you is what was the value of that aircraft, a float equipped aircraft in which you were riding that day without taking into consideration the value of the skis, the wheels and the landing gear? Surely it [167] wasn't worth \$3,000 if you arrived at a reasonable value by considering these other matters.

A. Well, there's two factors there that we haven't considered. That's overhauling the engine and the fact that there was the controllable propeller on the airplane which I didn't figure in the \$3200 originally.

Q. Is it still your opinion then that that air-

(Testimony of Jess G. Bachner.)

craft was worth \$3,000 just before it struck the ground? A. I think so.

Q. How much in your opinion are skis worth?

A. Approximately \$175.

Q. And how much in your opinion was the landing gear and wheels worth? A. About \$150.

Q. Now, Jess, what was your position in the aircraft at take-off and immediately prior to the accident? Where were you sitting in the aircraft?

A. Directly behind the pilot.

Q. Now, how tall are you, Jess?

A. Five, four.

Q. Now, did you have your safety belt on at all times from the time you took off until the time you struck the ground? A. Yes, sir.

Q. Now, sitting in an aircraft of that nature in the rear [168] seat, Jess, can you see over the side? A. Out the side of the aircraft?

Q. Yes. A. Yes.

Q. You mean you are tall enough that you can see over the side of the aircraft? A. Oh, yes.

Q. And were you at any time prior to the accident looking over the side of the aircraft and making any observations?

A. Not particularly, no.

Q. Isn't it true, Jess, that you could have made a 360 degree circle just as easily as you could have made a 180 degree turn to which you refer?

A. That's right.

Mr. McNabb: Now, just a minute. I object to that question as not material, it has no bearing

(Testimony of Jess G. Bachner.)

on the issues of this case whether he could have made a 360 degree turn.

Mr. Boggess: All right, I will reframe my question, your Honor.

The Court: All right.

Q. (By Mr. Boggess): Let's state it this way, Jess. Do you know positively that he only turned 180 degrees? A. No. [169]

Q. Do you have a compass in the rear seat?

A. No.

Q. From your position in that aircraft, Jess, can you see the horizon? A. No.

Q. Can you state positively, Jess, that you were only 4 or 5 minutes over the water? A. No.

Q. Would you state, Jess, what if any physical sensation of any peculiarity you had at the time you stated Doug lost control of the aircraft?

A. Will you state that again please?

Q. Did you have any peculiar physical sensation at the time you stated Doug lost control of the aircraft? A. No.

Q. Were you rammed up against your safety belt? A. Possibly I was, must have been.

Q. You don't recall? A. I don't recall.

Q. In your experience as a flyer, Jess, and the many times you have ridden I presume as a passenger, have you ever ran into a vertical air current that gave you the impression of so much velocity? A. No.

Q. In your experience—Jess, have you flown in the [170] Paxson Lake country often?

(Testimony of Jess G. Bachner.)

A. Yes.

Q. How many times would you say you have been up in that country?

A. Oh, 12, 15 times probably.

Q. I see. Have you flown over the crest of that hill on several occasions?

A. Yes.

Q. Have you ever run into any similar condition near or over the crest of that hill?

A. No, I haven't.

Q. Jess, you stated on direct examination that Doug thrust the throttle forward giving it more power at the time he lost control of the aircraft or just immediately after he lost control of the aircraft.

A. Yes.

Q. Did you see Doug hit the throttle?

A. Yes.

Q. You did see him hit the throttle?

A. I think I can remember that, yes.

Q. If he had also hit the stick in order to drop the nose, could you have seen that from your position?

A. No.

Q. And you do know that the nose did drop, is that correct?

A. Yes. [171]

Q. Now, Jess, you stated you were an overcautious pilot and there were varying degrees of caution exercised by pilots, is that correct?

Mr. McNabb: I object to that, your Honor, on the grounds that as I recall the testimony, he said different pilots flew differently but he never did state he was an over conservative pilot.

The Court: Objection sustained.

(Testimony of Jess G. Bachner.)

Q. (By Mr. Boggess): Are you, Jess?

Mr. McNabb: Now, just a minute. Are you what?

Q. (By Mr. Boggess): Are you what is known as an overly cautious pilot?

Mr. McNabb: I object to that on the grounds that is a phrase which cannot be correctly interpreted.

Q. (By Mr. Boggess): Do you exercise—all right, I will withdraw my question, your Honor and reframe it. Do you feel that you exercise more caution than the average pilot?

A. I feel that I do, yes.

Q. Jess, would you step down here a minute? You see that cross there, that “X”?

A. Yes. [172]

Q. Do you know what that “X” indicates on that map? A. Yes.

Q. What does it indicate?

A. It indicates the point of the mountain or hill.

Q. Now, in your opinion, Jess, would—what would be the safest way to depart from Paxson Lake going in a westerly direction?

Mr. McNabb: Now, I object to that question, your Honor, no proper foundation laid for it.

Mr. Boggess: Well, the foundation has already been laid. This man is a qualified pilot and a man of long experience in the aircraft industry, your Honor.

Mr. McNabb: There are many things which determine a safe way to leave any place and ap-

(Testimony of Jess G. Bachner.)

proach any thing, particularly altitude which has not been mentioned in the question.

The Court: You can bring out those points in your redirect examination if you like. Objection is overruled.

Q. (By Mr. Boggess): Would you answer the question, Jess?

A. Will you state the question again, sir?

Q. All right. In your opinion—just a moment. Will the reporter read the question back?

(The question was read to the witness as follows: [173] “Q. Now, in your opinion, Jess, would—what would be the safest way to depart from Paxson Lake going in a westerly direction?”)

The Witness: Well, in my opinion, the way I always do is circle before I ever start up.

The Court: You what before you start up?

The Witness: Circle the lake until we have sufficient altitude.

Q. (By Mr. Boggess): And what do you consider sufficient altitude departing from the lake, at the point of departure from the lake?

A. I don't recall the exact altitude there now.

Q. Well, I mean altitude above the lake?

A. Well, I would say at least a thousand feet above the crest of the hill. I don't know how much that would be above the lake.

Q. When you spoke of the crest of the hill, Jess, do you mean the crest of the hill marked “X”?

(Testimony of Jess G. Bachner.)

A. No, the crest of the hill at any point you may take to cross it.

Q. Now the contour lines on this map, Jess, indicate that the crest of the hill at the point where it would have been passed had Doug continued his flight is about 800 feet above the level of the lake. Does that seem accurate? [174]

Mr. McNabb: Now, just a minute. Mr. Reporter, read that question please.

(The question was read by the reporter as follows: "Q. Now the contour lines on this map, Jess, indicate that the crest of the hill at the point where it would have been passed had Doug continued his flight is about 800 feet above the level of the lake. Does that seem accurate?")

Mr. McNabb: Now, your Honor, this witness has not testified as to where Mr. Heay would have crossed that hill had he continued in his flight. The question is not material to the issues and no proper foundation has been laid for it. There's no showing that—I don't know whether Mr. Boggess is testifying from the map or how he has arrived at his 800 feet.

The Court: Read that question again please?

(The question was read as follows: "Q. Now the contour lines on this map, Jess, indicate that the crest of the hill at the point where it would have been passed had Doug continued his flight

(Testimony of Jess G. Bachner.)

is about 800 feet above the level of the lake.
Does that seem accurate?")

The Court: Objection overruled.

The Witness: Well, I wouldn't have any way of knowing. [175]

Q. (By Mr. Boggess): Assuming, Jess, that is accurate, do you think in your opinion as a pilot that the defendant in having circled to an altitude of approximately 1,000 feet above the lake or having attained an altitude of approximately 1,000 feet above the lake and then proceeding in a climbing attitude towards that point, in your opinion, was he exercising due care? A. No.

Q. What would have constituted the exercise of due care, Jess?

A. You mean what should he have done?

Q. Uh-huh.

A. You said that was 800 feet above the lake. In my way, I do as I stated before, you should have at least 1,000 feet above the top of the hill wherever you're going to cross it.

Q. You believe he should have been 1,800 feet over the lake when he departed from the shore of the lake, is that correct? A. That's correct.

Q. In your experience as a pilot, Jess, in that particular country, have you ever flown over that crest at less than a thousand feet?

A. I couldn't say.

Q. Do you think, Jess, that assuming a person followed your procedure and circled until he had

(Testimony of Jess G. Bachner.)

attained an altitude of at least 1,000 feet above the altitude of the crest towards [176] which he was heading, do you think that had he done that and then had he experienced a vertical air current of the type that you experienced that day, do you think he would have been able to recover?

Mr. McNabb: Now, just a minute before you answer that question. I object to it, your Honor, on the grounds that there is no showing—it is not relevant and there is no showing that there would have been an air current of the nature of the one which struck here had he attained a thousand feet altitude over the crest of that hill.

The Court: Objection overruled, you may answer.

The Witness: Will you state the question again please?

Mr. Boggess: Would you read the question back, Mr. Reporter?

(The question was read to the witness as follows: “Q. Do you think, Jess, that assuming a person followed your procedure and circled until he had attained an altitude of at least 1,000 feet above the altitude of the crest towards which he was heading, do you think that had he done that and then had he experienced a vertical air current of the type that you experienced that day, do you think he would have been able to recover?’”)

The Witness: I don't know. [177]

(Testimony of Jess G. Bachner.)

Q. (By Mr. Boggess): Jess, from your experiences as an aircraft mechanic and as a pilot, what effect if any would there be on the number of revolutions per minute of a prop when an aircraft struck a vertical air current? Would there be any—I will rephrase my question. Would there be any effect at all on the number of revolutions per minute of a prop when an aircraft struck a vertical air current?

Mr. McNabb: I object to that on the grounds it is not relevant nor material to the issues in this case, your Honor.

The Court: Objection overruled.

The Witness: I don't know.

Q. (By Mr. Boggess): You don't know whether there would be any effect or not?

A. There could be and there—there is no way of determining that.

Q. Is it possible it might have revved up?

A. Yes.

Q. Do you recall, Jess, in which direction you were heading immediately prior to the time that you struck the ground? A. No.

Q. You do not? I have no further questions.

Mr. McNabb: Just a minute, please. [178]

Redirect Examination

By Mr. McNabb:

Q. Now, Mr. Bachner, you set the reasonable value of that aircraft at \$3,200.00?

A. That's right.

Q. Then you stated that without the skis and

(Testimony of Jess G. Bachner.)

without the landing gear you believe it to be worth the reasonable value of \$3,000.00, is that correct?

A. The condition it was in just before it struck the ground, yes.

Q. Yes. Now, you state that you believe the reasonable value of the skis to be \$175.00, is that correct?

A. That's right.

Q. And the reasonable value of the landing gear and wheels to be \$150.00?

A. That's right.

Q. Now, purely then a matter of mathematics, \$175.00 for skis and \$150.00 for landing gear and wheels is \$325.00 and from \$3,200.00 that leaves \$2,875.00.

A. That's right.

Q. Now, how do you arrive—what is the—what are your mental processes—what mental gymnastics did you go through to result with a \$3,000.00 figure using simple arithmetic to come out at \$2,875.00?

Q. As I told him, we didn't consider the prop and the [179] overhauling of the engine in the \$3,200.00 approximate figure I gave.

Q. I didn't understand your last statement.

A. I say as I told him we didn't include the fact that it had a controllable propeller and overhauling the engine at the time I give you the approximate figure of \$3,200.00.

Q. Well then, how much was that controllable propeller worth?

A. It is worth approximately \$290.00 new.

Q. Well, at the time, what—at the time of the crash, just prior to the crash, how much was it worth?

(Testimony of Jess G. Bachner.)

A. I wouldn't know. It would depend on what condition it was in.

Q. Well, did you examine that prop at the time you made that major overhaul? A. Yes.

Q. Well what condition was it in at that time?

A. It was in good condition.

Q. Now, did you have any occasion to see that aircraft or look at that prop between the time that you made the major overhaul and the time it crashed? A. No.

Q. You don't know what condition it was in then? A. No.

Q. How much was it worth when you examined it when you [180] made the major overhaul?

A. Well, I would say it would be worth at least \$200.00.

Q. And to the best of your knowledge, if anything had been wrong with that prop, would you have detected it from the operating of the aircraft?

A. Yes.

Q. Then can you state with reasonable certainty that the prop was in practically the same condition at the time of the crash that it was when you examined it when you made the major overhaul?

A. I think it was, yes.

Q. Now, the prop was worth how much when you made the major overhaul?

A. I judge it to be approximately \$200.00.

Q. Now, how much do you judge it to be if you believe it was in approximately the same condition at the time of the crash as it was at the time you

(Testimony of Jess G. Bachner.)

made the major overhaul, how much do you estimate the value of that prop to be just prior to the crash?

A. I don't know. I don't know how much time they put on it. Water is awfully hard on propellers.

Q. All you can say about the prop is that a few weeks prior to the crash when you examined it, it was worth about \$200.00?

A. That's right. [181]

Q. And that increased—using that \$200.00 figure, that would have increased the price of the value of the plane at the time of the crash at \$3,400.00?

A. No. The value of the airplane as it was at the time of the crash which didn't include the landing gear, skis or (interrupted).

Q. Well, now, Jess, here's what I want to know. You stated that at the time of the crash the airplane was worth \$3,200.00?

A. No, I did not.

Q. Well, at the time of the crash, how much was the airplane worth?

A. As it was at the time of the crash?

Q. Just as that airplane was before the instant before it hit the ground. What was the reasonable value of it with that prop, with that motor, with those wings, with that set of skis—wheels or floats on there, how much was that mechanical device which we know as an airplane worth just before it hit the ground?

A. Three thousand dollars, as I said.

Q. Just as it hit the ground it was worth that

(Testimony of Jess G. Bachner.)

much and you are not talking about skis or anything else? A. No.

Q. Now, when did you last see the skis—did you ever see the skis on that (interrupted).

A. No, I didn't. [182]

Q. So you don't know definitely that those particular skis were worth \$175.00?

A. No, I don't.

Q. How did you arrive at this \$175.00 figure?

A. It's just an average, a going price for that type of ski.

Q. And in what condition?

A. In fair condition.

Q. Is the same thing true of the landing gear and wheels? A. That's true.

Q. Now, Jess, how do you arrive at your statement that you were four, five minutes over the water?

A. Well, it's just merely a guess. There's no way to arrive at any positive time.

Q. Now, do you believe you would have known it had you made a complete circle over that lake?

A. I don't know. It's possible. A person just doesn't pay any attention to those things.

Q. Now, Mr. Bachner, let us assume that—well, was that airplane climbing from the time it took off the water until it crossed (interrupted).

A. I think so.

Q. Do you know whether it was or not?

A. No.

Q. You don't know whether it was or not? [183]

(Testimony of Jess G. Bachner.)

A. No.

Q. How many times do you say you have crossed those hills?

A. I would say 12 or 15 times, somewhere in that neighborhood.

Q. Were you piloting the aircraft all of those occasions? A. Yes.

Q. You never crossed them prior to that time as a passenger? A. Not that I recall now, no.

Q. Now, Mr. Bachner, why do you want a thousand feet altitude over the crest of the hill before you start approaching it?

A. Well, I am personally a high flyer, that's all.

Q. Well (interrupted).

A. I like to go as high as I can get.

Q. What reason do you have for wanting a thousand feet altitude?

A. The more altitude you have, the safer you are.

Q. Safer from what?

A. From the ground.

Q. What reason would you have for striking the ground if the plane is operating and the motor didn't fail?

A. Nobody knows. Anything can happen.

Q. You think it is a safe policy to fly high?

A. That's right.

Q. Did you ever approach that hill the other times that [184] you had flown down there in the manner in which you approached that day with Mr. Heay? A. Not that I remember. Oh, no.

(Testimony of Jess G. Bachner.)

Q. Would you have remembered it if you approached it that way? A. I don't know.

Q. Do you think he approached that hill in a safe manner? A. Personally, no.

Q. Do you think you crossed that hill at a thousand feet every time you went over?

A. I don't know.

Q. Is it your policy to cross that high?

A. Yes.

Q. You think it is reasonable to assume that you crossed at a thousand feet altitude over the crest then? A. I think so.

Q. You say you never hit a downdraft when you went that high? A. No.

Q. Did you ever hit any downdrafts at that height as you crossed those hills?

A. Not that I can remember of, no.

Q. Do you believe if you had been a thousand feet high that day that you would have not struck that downdraft? A. I couldn't say. [185]

Q. Well, do you know how those air currents run down there? A. No.

Q. Are you familiar with movements of air masses? A. No, not particularly.

Q. Well, if you had been a thousand feet and hit that downdraft, that same downdraft, would the possibility of recovery have been greater or less?

A. It would have been less.

Q. With a thousand feet (interrupted).

A. Wait a minute, now.

(Testimony of Jess G. Bachner.)

Q. If you had a thousand feet altitude over the crest of that hill and hit that downdraft, would the possibilities of recovering, in other words, the possibilities of avoiding striking the ground, would they have been greater or less.

A. They would have been greater. The more altitude you have the better off you are at any time.

Q. You think then that if you hit that same downdraft with a thousand feet altitude, you would have more chance of recovery?

A. That's right.

Q. It would have been safer?

A. That's right.

Q. Is that the reason you fly a thousand feet?

A. Yes. [186]

Q. Is it reasonable to assume flying in that country you might hit a downdraft if you fly as he flew?

A. Yes.

Q. Is that the reason you want a thousand feet?

A. Yes.

Mr. McNabb: That's all.

Recross-Examination

By Mr. Boggess:

Q. You would fly 60,000 feet if you can get it, wouldn't you, Jess? A. That's right.

Q. Jess, you have testified that you determined the basic value of this aircraft minus skis and floats and so forth from your perusal of the Trade-A-Plane (interrupted). A. That's right.

(Testimony of Jess G. Bachner.)

Q. (Continuing): —is that correct? Now, in your opinion, from your perusal of the Trade-A-Plane and your own dealings in aircraft, is it a fair valuation of an aircraft to take its basic value minus these accessories and then add the accessories to it in order to obtain its market value?

A. I think so.

Q. I believe you also testified that the Trade-A-Plane you consulted was the last issue of the Trade-A-Plane? A. That's right. [187]

Q. Now, Jess, have you noticed any scarcity in available materials for repairing aircrafts and instruments and so forth recently? A. No.

Mr. McNabb: Now, just a minute. Well, it doesn't make any difference.

Q. (By Mr. Boggess): You haven't?

A. Not yet.

Q. You haven't noticed any adjustment upward on the price of aircrafts from the day of the accident until today?

A. Not of that particular type, no.

Mr. Boggess: That's all.

Redirect Examination

By Mr. McNabb:

Q. Jess, do you believe that you would—how much safer would you be at 60,000 feet than 1,000 feet? A. Just 60 times.

Q. You think you would be 60 times safer up there? A. Yes.

Mr. McNabb: I have no further questions.

(Mr. Jess Bachner left the witness [188] stand.)

Mr. McNabb: Your Honor, the witness which I had planned to call following Mr. Bachner had to go to Fort Yukon this morning and he will be back at two o'clock. If we can have a recess until that time (interrupted).

The Court: Very well. Nothing on during the noon hour is there, Mr. Clerk?

The Clerk: No, there is not, your Honor.

The Court: All right. Recess until two o'clock.

The Clerk: Court is recessed until two o'clock.

(At 11:45 a.m., the trial of this cause was recessed until two o'clock p.m.)

(At 2:00 o'clock p.m., the trial of this case was resumed.)

The Court: Counsel ready to continue with the trial?

Mr. McNabb: Ready, your Honor.

Mr. Boggess: Yes, your Honor.

The Court: Very well.

Mr. McNabb: Call Mr. Acord, please. Just step up here in front of the Clerk and be sworn, Mr. Acord. [189]

RANDALL K. ACORD

called as a witness in behalf of the Plaintiffs, having been first duly sworn, testified as follows:

Direct Examination

By Mr. McNabb:

Q. Will you state your name, please?

A. Randall K. Acord.

Q. Where do you reside, Mr. Acord?

A. Fairbanks, Alaska.

Q. What is your occupation?

A. Sales representative and commercial pilot.

Q. Are you a licensed pilot?

A. That is correct.

Q. By whom are you licensed, Mr. Acord?

A. C.A.A., commercial single, multiple engine land; instrument; that's all.

Q. And how long have you had that license—those licenses, Mr. Acord?

A. Well, my flying started in August, 1941, but I received my C.A.A. commercial license in April, '46. The previous time was with the air force.

Q. As a member of the armed forces, were you a pilot?

A. That's correct.

Q. How many hours have you had?

A. Well, I haven't totaled my log book lately, about 5,300 [190] and something, probably run around 5,400 now, maybe a little better.

Q. Has all that been in single engine aircraft?

A. No, that's been in everything from B-29's on down.

(Testimony of Randall K. Acord.)

Q. Do you have any single engine aircraft experience?

A. I have. I would say out of the 5,400 hours, there is about 3,000 hours of it in single engine since I was assigned to the fighter command of the air force.

Q. Have you had any experience operating what we non-pilots call light airplanes?

A. I have. I have owned two myself.

Q. That is, something with a 100 or 115 horsepower or in that general category?

A. And less.

Q. And less? How much of your flying have you done in Alaska?

A. As well as I remember, I had about 1,200 hours when I came to Alaska in '43, summer of '43.

Q. And the balance of your hours have been flown in Alaska, is that correct?

A. That's correct.

Q. How much of that time has been—how much—how many of the hours which you have flown in Alaska were flown in light aircraft?

A. Well, I put over 200 hours on that Luscomb before I [191] sold it and I figure 1,600 hours on my Beach now and other than what I have flown in the military such as L-5's and AT-6's, but, of course, that's higher horsepower.

Q. Have you had occasion to fly in the vicinity of Paxson Lake in Alaska? A. Many times.

Q. Well, approximately how many times have

(Testimony of Randall K. Acord.)

you flown over Paxson Lake or in the vicinity of Paxson Lake?

A. It would be hard to say exactly but I would estimate probably between 35 and 40 trips that I have made between here and Cordova and Valdez in the last three years just in selling alone. I will run about eight trips a year selling and I have charter trips to Valdez which takes you through that area.

Q. From the experience which you have had in that general vicinity, are you—have you become acquainted with the general weather and air movements of that area?

A. Generally speaking, yes.

Q. Are you familiar with Paxson Lake itself?

A. Well, I have landed on the strip many times at Paxson but I have never operated off the lake itself.

Q. But you are familiar with the general terrain in the vicinity of Paxson Lake?

A. Yes, I am.

Q. And the hills that are on either side of the lake? [192]

A. Yes, I am.

Q. And the pass? A. And the pass.

Q. And you have taken off that landing strip at Paxson? A. Yes.

Q. How much of your flying has been over mountainous country?

A. Gee, that's hard to say because every trip I have in Alaska—that you take in Alaska—unless it is from here to Nenana or somewhere, it is across a mountainous range somewhere.

(Testimony of Randall K. Acord.)

Q. You would say practically all of your flying has been in mountainous country?

A. It would involve crossing of high terrain somewhere en route.

Q. Now, Mr. Acord, assuming that a plane took off from Paxson Lake in a northerly direction, that plane being a Piper Super Cruiser with a 115 horsepower Lycoming engine, and assuming that the plane was climbing at approximately 70 miles an hour in a generally southwesterly direction and approaching the hills on the westerly side of Paxson Lake at an angle of 45 degrees and assuming that the wind was travelling in the generally southerly direction, the plane leaving the lake at approximately 1,000 feet altitude above the water and at a point under the ridge or the crest of the hill and at a point some place between 800 and 1,000 [193] feet from the hill side and from 500—4 to 500 feet above the ground, if the plane crashed to the earth nose first, assuming those facts to be true, can you state an opinion with any reasonable certainty as to the probable cause of that accident?

A. Well, an aircraft that crashes nose downward is usually—let me rescind that part. I would like to start that over. Many times pilots with thousands of hours of experience cannot distinguish a stall when it is approaching. That's been a proven fact by writers and pilots and even C.A.A. examinations for years. It is the reason for the invention and more or less required installation of these safe flight indicators which are—that the C.A.A. is try-

(Testimony of Randall K. Acord.)

ing to get required on all aircraft. It is now even on the military aircraft because pilots cannot recognize stalls. I know in my case many times I have tried to climb hills flying into the wind on the leeward side of the hill and not watching my air speed and I have noticed many times that I would approach a stall and not recognize it until I happened to look down at the air speed and see where I really was. In fact, I almost went into Mt. McKinley with a P-38 once and almost didn't recognize a stall in one of those. In anything else, I would have killed myself. You cannot recognize a stall especially if it is accompanied in a slight downdraft because the two are so similar. Most—almost all the aircraft that I have ever seen or read or heard about that have gone into [194] the ground due to downdrafts or failing to climb over hills or something like that when they were not stalled usually hit pancake—in other words, flat. Why this aircraft would go nose down I would say would probably be caused by a partial stall which the nose drops when a stall is encountered and maybe he was in a partial stall accompanied with a slight downdraft and that would more or less account for the nose being down. But if he was climbing and the downdraft pulled him into the ground and he was not stalled, he should have hit flat. Does that cover your question?

Q. Well now, can you state whether—can you state with reasonable certainty as to—in your opinion—what did, in fact, cause that accident?

A. Judge, I didn't go over this much before I

(Testimony of Randall K. Acord.)

came in here. I didn't think about it much so it will probably take a little time. (Pause.) Well, downdrafts are very frequent in that locality.

Q. Well, is that generally known to be true?

A. Well, generally, yes. In the Paxson Lake area the hills are not what you call sharp. They are more rounding and rounding hills will give you a downdraft without turbulence. Usually if a pilot encounters a downdraft, there is turbulence and he can recognize it much easier than he does if it is a small air downdraft or what I call small air downdrafts. But I would say from past experience and from [195] reading of other articles—in fact, the Daily News Miner had articles in it just recently written by Mr. Gretzer, the chief airman of the C.A.A. for this region, on pilot's failure to recognize stalls or partial stalls when trying to climb over hills and downdrafts or something like that. But those things usually can be recognized if the downdraft is of any intensity or if you see that you can't get over a hill, you can usually recognize that fact far enough ahead that it is no trouble to turn around and go back down the hill even if you have to lose a little altitude to go back down the hill to gain your speed back because I know I have had to do that a few times myself when I would be heavily loaded in some low-powered aircraft.

Q. Well now, as a safety factor, what is normally done? What do people or a reasonably prudent pilot do in approaching hills to prevent finding himself in a position from which he cannot recover?

(Testimony of Randall K. Acord.)

A. Well, I know what I would do and I might add here, too, that in all the flying magazines in the last couple of years there have been extended articles written on how to fly mountain country and they all cover the same general information. I know when I fly a low-powered aircraft and if it is loaded pretty heavily, I always climb on the up-wind side of the hill until I am sure I have plenty of altitude.

Q. Well, now, Mr. Acord, you say you climb on what hill now— [196] what side of the hill?

A. You climb on the windy side of the hill.

Q. Well (interrupted).

A. That gives you an updraft on the windy side of the hill.

Q. Having taken off from Paxson Lake, where could this airplane have done its climbing if it were the intention of the pilot to cross the hills on the west side of the lake?

A. Well, with the hills to the west of the lake being higher than the ones to the east of the lake, he could have probably gained a little altitude a little faster by climbing just, oh, maybe couple of hundred yards east of the lake shore where the wind slopes going up the highway, where the highway comes by. It would at least help it a little until you get to a thousand feet or so because on a warm day and in the summertime and in that elevation which is—what is it, 2,600 feet I believe that lake is, something like that (interrupted).

Q. 2,650.

Mr. Heay: 2579.

The Witness: That will make a lot of difference

(Testimony of Randall K. Acord.)

in the power output of the aircraft so you are going to need the play of all of the advantages you can to help you gain altitude or otherwise you're going to be sitting there for hours to get any altitude to get over any hills. I know my little old Luscomb when I was spraying the city [197] here for mosquitoes, I could fly over that high school building down here and had to hold my altitude at 150 feet which was what I was spraying at and my air speed was from 85 to 70 just on the other side of the school building to hold at 150 feet with the wind blowing from the west (interrupted).

Q. So there is a very considerable variation?

A. It varies according to the velocity of the wind and the shape of the terrain.

Q. Mr. Acord, are there any standards established by pilots of experience or by the C.A.A. or anyone else concerning a safe height to cross hills?

A. No, there is not. However, that is all left to the discretion of the pilot. There are set rules for instrument flight but there is none for what we call flight rules.

Q. Well, do you know what the normal practice or the normal procedure of men flying aircraft such as this use in crossing hills?

A. That is a little item that is determined by judgment of the pilot. That is up to him and it depends on his judgment as to what altitude he feels would be best to fly which would vary considerably according to the type of terrain you are going over and the velocity of the wind. Even the weather con-

(Testimony of Randall K. Acord.)

ditions—if you've got low ceiling, you are going to have to fly low which is something you don't like to do when the wind is blowing hard and when the wind is blowing [198] hard, the weather is bad.

Q. Now, in the situation which I outlined to you, is it your opinion that a reasonably prudent pilot in a similar situation would have left the lake and approached the hill on the west of Paxson Lake?

Mr. Boggess: At this time, your Honor, I will interpose an objection. Mr. Acord in a statement just made previously to this question mentioned certain other factors that a pilot would consider which haven't been discussed. I think he mentioned discernible turbulence perhaps encountered prior to his approach of the crest of the hill and also velocity of the wind. Now, in the previous hypothetical questions that have been posed, those two factors have not been covered, your Honor, and I think that we should cover them before Mr. Acord gives an opinion.

The Court: Yes, perhaps you should put those elements in the question.

Mr. McNabb: Well (pause).

The Court: Would you want that objection read again?

Mr. McNabb: Well, your Honor, as I recall the testimony of both of the witnesses who were in the aircraft at the time of the accident, they stated that they didn't know what the wind velocity was and Mr. Heay stated that when he turned south in his

(Testimony of Randall K. Acord.)

360 degree turn that [199] he had turned down-wind.

Mr. Boggess: If I recall correctly, your Honor, Mr. Heay testified that there was a 10- or 15-mile-an-hour wind at the time of the second take-off in that area.

The Court: Yes, I think so. That is my remembrance of it.

Mr. McNabb: Well, that's all right.

Mr. Boggess: And nothing to mild turbulence encountered right up until the moment (interrupted).

The Witness: Judge, may I ask a question? I wasn't in on part of this before so I don't know. Was this a second flight from Paxson over to the lake for the day—I mean, the same day?

Mr. Heay: I made an attempted take-off (interrupted).

The Witness: Oh, before?

Mr. Heay: (Continuing): —and unloaded one passenger. This is my second attempt. This was the first take-off, second attempt.

The Court: Do you have a C.A.A. report of the wind velocity and weather condition at Gulkana?

The Witness: At the time of the accident? That C.A.A. station is something like 40 miles from Paxson and the winds at Gulkana usually coincide with what goes [200] through Isabel Pass so that information could be obtained if it would be of any information to the court.

(Testimony of Randall K. Acord.)

The Court: Do you have it in the weather bureau?

The Witness: The weather bureau can give it to you. They have that on file. They keep all those records for such purposes on back references. I don't know—all I remember about this thing is what took place in the conversations that were going on at the time of the accident. I understood the wind was from the southwest or west or west southwest so I would say that the hills being as they are through there, you could probably have a 10- to 15-mile-an-hour wind and have very mild turbulence and still have a little downdraft, but the point I would like to bring out to the court here is the old problem that the C.A.A. has been trying to determine for years, how to teach pilots how to tell the difference between an approaching stall where they are settling due to lack of speed or a downdraft. That is the thing that is—well—I guess there has been a dozen airplanes since I have been in Alaska here that have gone into hills due to that and that was one of the reasons that the articles were published in the paper by the C.A.A. They started this series of educational articles to try to help out people on things like that. But not having heard any of the other parts of this proceeding here, I would say that [201] the Gulkana wind would have quite a bearing on what the wind velocity was at the top of the hills. At least, that's my experience in flying through that country.

(Testimony of Randall K. Acord.)

Q. (By Mr. McNabb): Well, Mr. Acord, (interrupted).

Mr. Boggess: May I say something off the record at this time, your Honor?

The Court: Yes.

(An off the record discussion was had at this time.)

The Court: I think we stopped where there was an objection because there were a couple of elements that Mr. Boggess thought should be put in the hypothetical question. Do you remember what it was?

Mr. McNabb: I think we will just start from here again.

The Court: All right, we will start again from the beginning.

Q. (By Mr. McNabb): Now Mr. Acord, in your opinion should Mr. Heay as the operator of that aircraft have known the approximate direction and velocity of that wind by virtue of his place as the pilot?

A. Well, he should have known approximately the speed that he was making on the ground which would indicate whether he's got a head wind or tail wind. The amount of crab he had been [202] holding to make a course across the ground would determine whether the direction is from the right or left and if you are climbing up over a hill at a slow speed like he probably was, if he was climbing at what did you say—70 miles an hour, I believe?

(Testimony of Randall K. Acord.)

Q. That's right.

A. There isn't much safety factor left with an aircraft that stalls around 48 or something like that, whatever it stalls at. It doesn't leave much leeway for any additional performance when you get in what you might call a tight position where you need more performance because it just doesn't have it. Oh, I would say that in my opinion the troubles could have been anticipated normally. Whether these are abnormal conditions, I don't know but I mean through that country most anything is abnormal in a way. In fact, Alaska—all over Alaska, Alaska conforms to no standard laws of meteorology. All the weather in Alaska is born by terrain. Look how often the forecasters miss it. They forecast according to air masses. That gives them nothing but wind circulation but they don't take into consideration the weather that is born by that wind blowing across the terrain of Alaska which is the controlling factor. Now, I say abnormal up there. I don't mean abnormal in that particular spot or anything of that kind. Old Sig Wien taught us an awful lot about that kind of stuff. It holds true and it doesn't work in the states. [203] Pilots who have flown much time up here gradually pick that stuff up and, of course, mountain flying is similar all over.

Q. Mr. Acord, with the facts which Mr. Heay had available to him as the pilot of that plane, in your opinion was it prudent to fly only 500 feet—between 4 and 500 feet altitude, at an altitude of 4 to 500 feet over the hill while climbing to get over the crest of it?

(Testimony of Randall K. Acord.)

A. Would you clarify that a little? You mean 4 to 500 feet above the crest of the hill when he goes over?

Q. No. Four to five hundred feet above the ground climbing to get over the crest, but under the brow of the hill—he was at an altitude of between four to five hundred feet above the ground, approximately 800 to 1,000 feet from the side of the hill approaching it at a 45-degree angle, but under the brow of the hill.

Mr. Boggess: At this time, your Honor, I would like to object because I think the testimony—now which brow of which hill are you referring to, the mountain or the top of the saddle he was approaching?

Mr. McNabb: He said he was still climbing and if he had been—if he had ever reached it, he would have enough altitude to get over the hill.

Mr. Heay: Your Honor (interrupted).

The Court: Mr. Heay, you have an attorney. Do not speak up unless (interrupted). [204]

Mr. Boggess: Your Honor, this is the testimony as I recall it; that Mr. Heay had circled to an altitude of 1,000 feet over the lake prior to the time that—still in a climbing position. He turned towards a spot on the saddle being approximately 800 feet above the level of the lake, making his altitude at that time at the time he left Paxson Lake towards the saddle 200 feet higher than the saddle. That is the testimony as I recall it, your Honor.

The Court: Well, I'll overrule your objection. Of course, you have a right to (interrupted).

(Testimony of Randall K. Acord.)

Mr. Boggess: I realize that, your Honor.

The Court (Continuing): —cross-examine in the light of other facts.

The Witness: Judge, I am not on either side of this. As far as I see it, this is strictly—they just asked me up here to testify from the flying standpoint of this thing. I would say taking off to the north as they say he took off and if he did a 360 degree turn in a Super Cruiser, you won't have 800 feet to start with, not with the load that he had because it had 2 passengers and a tool box from my standpoint of the accident report.

The Court: He should have told you he took off a passenger. He couldn't get off with 2 [205] passengers and he let one off so that when he finally got off (interrupted).

The Witness: When I say two passengers, I mean a pilot and one passenger.

The Court: Oh.

The Witness: It's a two place airplane.

The Court: I see.

The Witness: And on floats, see that cuts down the performance of an airplane too unless he had hit an updraft somewhere along the line to help him get up to this 800 feet because a Super Cruiser don't have that rate of climb in a 360 degree turn with a load he had and with floats on—even wide open.

Mr. McNabb: Will you read the question which I asked?

The Court: It will take a long time to get back

(Testimony of Randall K. Acord.)

to that now. Can you remember it or can you restate it?

The Witness: I think I remember that question. He went over it twice for me before. I would say probably the average pilot would approach the hill reserving his judgment to the point that if he didn't make it or saw he couldn't make it, he could turn around and go back. That falls back in the old human element of error and falls back on the judgment of the pilot at the wheel. You have [206] to anticipate two or three miles ahead of an airplane all the time in order to fly one. Just like a car only you have to anticipate a car two or three hundred yards or less, but an airplane, you've got to stretch that further because it goes faster. So, it all falls back on the judgment of the pilot to anticipate those things and if he sees he can't make it, he can turn around and go back. If all pilots had good judgment when they get in to bad weather instead of trying to go on further they would all turn around and go back—but they don't do that—so a bunch of them get killed. How are you going to judge between individuals whose judgment is going to determine? You see what I mean? You can't rate an individual's judgment without him demonstrating it, so you would have to almost duplicate those same conditions in another airplane like it to come to a 100% sure fact of what happened. I still believe in my opinion and did at the time of the accident from what I had heard about it and so forth, I believe that the aircraft stalled

(Testimony of Randall K. Acord.)

and wasn't pulled in a downdraft because it went into the ground nose first. If he was only 4 to 5 hundred feet above the ground—when you do a stall in a small aircraft, the minimum amount of altitude loss with a safe recovery is 100 feet and sometimes it will go to 200 feet or 250 feet loss to recover from a stall. If a slight downdraft is accompanied with that stall, then you are going to lose more altitude before you can recover from it. Like [207] I said before, if he had not been in a partial stall or approaching a stall or maybe stalled, he should have hit going flat, that is, as I mentioned, pancaked into the ground.

The Court: Well, if he were starting on a stall and he turned the nose down, would that have any effect on whether he hit flat or nose down?

The Witness: Yes, it would, but normally if the hill is up in front of him, the average fellow if he is going to gain altitude in order to have more altitude, he is going to turn down that hill at the same time. It could be that it stalled so quick on him that maybe the nose dropped through or maybe he pushed the nose over. I don't know. Lots of things are done and he might not even remember himself. But you still have that tendency to get the nose down to get your speed back up and at the same time try to get that hill away from you so you will have more altitude to get it back. That's the normal reaction.

The Court: There is evidence that he did that.

The Witness: So I don't know how you're going

(Testimony of Randall K. Acord.)

to tell whether he was in a partial stall. He probably didn't recognize it himself. Most pilots don't.

Q. (By Mr. McNabb): Mr. Acord, in your opinion, would a reasonably prudent pilot under the same or similar circumstances have flown [208] that aircraft at such an altitude as to have been able to recover without striking the ground?

A. Well, that's what the C.A.A. says you are supposed to do and that is what most pilots should do. But do they do it? That's that old judgment again.

The Court: Isn't there a C.A.A. rule that says you must fly at a thousand feet?

The Witness: No, that's over populated areas only. There is no rule that is over open terrain—there is no assigned altitude under V.F.R.—visual flight rule condition. But over populated areas such as the City of Fairbanks and any other place where there is a lot of people congregated, you have got to have a thousand feet above the terrain or higher without a special waiver and I had such a waiver when I was doing all this spraying and stuff like that. That was a special permit that has to be requested through channels of the Anchorage office.

Q. (By Mr. McNabb): In your opinion, Mr. Acord, from the facts which have been outlined to you here, assuming the facts to be true as they have been outlined to you, in your opinion did Mr. Heay exercise good judgment in operating that air-

(Testimony of Randall K. Acord.)

craft as the facts which I have outlined to you indicate?

A. Well, before I answer that, I would like to go into it more, too. It is something you can't say. I mean, I have been [209] in this flying business a long time and I have had a couple little accidents myself and you hear of an accident and you say, "Well, that guy did wrong. I would have done it this way." Well, would you? How do you know if you put yourself in the same spot? Now, I know what I would have done in Doug's position due to my experience in light aircraft and so forth. I would have gained more altitude of that lake before I ever headed toward the hill, but would anybody else do it? I have had such close calls doing the same thing he has done that I have learned without getting caught, but I would say (pause)—boy, it's a rough question because you don't know unless you are under the exact same conditions because I know I would have gained more altitude before I started over it because of my past experiences, but somebody who hasn't encountered those same experiences probably would do the same thing Mr. Heay did until they learn. He probably wouldn't do it again, but that doesn't solve the problems of the court. I realize that.

Q. Well now, tell me this. Should a licensed pilot who has spent 1500 hours operating aircraft of this type in Alaska know that was improper?

A. I would say with 1500 hours of experience he would have probably some close calls similar to

(Testimony of Randall K. Acord.)

that before and he should have learned something from those which would have helped him out. But as to the question you shot at me before, it [210] puts me in an awful spot because I have never ridden with Doug. I don't know what kind of a pilot he is from my experience of riding with him and I would rather reserve the right of passing judgment on a fellow that I have never ridden with.

Q. Well now, Mr. Acord, we are not interested in Mr. Heay's ability as a pilot. That has no place in this case whatever. We are talking about that theoretically reasonably prudent pilot who is operating the same type or similar aircraft in a similar situation.

A. All pilots are taught to fly under similar and basic laws and rules. They are all taught basic laws and rules of meteorology which cover exactly these things we are talking about now. You are warned about those things in these laws and the general characteristics of meteorology and they are passed on as an education and the experience of other pilots are passed on to you as to what they have encountered under similar conditions and it's part of the pilot training. All pilots are instructed basically the same or supposed to be. The C.A.A. has tried to standardize all of that stuff. The Army standardized it first and the C.A.A. followed along second. All of that is supposed to be covered in the basic training of a pilot. Whether he exercises that as good judgment after he starts flying on his

(Testimony of Randall K. Acord.)

own is strictly up to the individual pilot. I would say that under normal conditions in flying mountainous terrain due to the training [211] that I have had and with the articles I have read and what information is available, all pilots should get a safe cruising altitude above all terrain before heading off on course or have a flat country like the Tanana Valley or something to climb over until they are at their cruising altitude to head on course. That's a general law I have always made a practice of and it has always worked and it is a law that is a custom I would say that all pilots do the same.

Mr. McNabb: That's all.

Cross-Examination

By Mr. Boggess:

Q. Now, Mr. Acord, assuming that Jess had unlimited ceiling and there existed at Paxson Lake a surface wind—that is a wind at the level of Paxson Lake—of 10 to 15 miles an hour without gusts; assuming also that the aircraft was not overloaded and the engine, a 115-horsepower engine, was in good operating condition and the pilot under those circumstances circled above Paxson Lake until he had obtained an altitude of 1,000 feet, then left Paxson Lake heading at a degree of incidence of about 45 degrees to the saddle—towards the saddle—at a point on the saddle approximately 800 feet above the level of Paxson Lake and continued his

(Testimony of Randall K. Acord.)

climb at 70 miles an hour and had experienced no prior turbulence or light turbulence at the most and stopping at that very point, [212] would that pilot in your opinion be exercising sound pilot judgment?

A. I would say under those conditions that he would have had an indication of a downdraft already because he had obtained an altitude of a thousand feet (interrupted).

Q. Now, just a moment (interrupted).

A. He was down to 800 feet which means a 200 foot loss which indicates a downdraft already.

Mr. Boggess: Would you read (interrupted).

The Witness: And still climbing.

Mr. Boggess: I am sorry, Mr. Acord. I would like to have the reporter read back my question, your Honor.

The Court: Read the question, please, Mr. Reporter.

(The question was read to the witness as follows: "Q. Now, Mr. Acord, assuming that Jess had unlimited ceiling and there existed at Paxson Lake a surface wind—that is a wind at the level of Paxson Lake—of 10 to 15 miles an hour without gusts; assuming also that the aircraft was not overloaded and the engine, a 115-horsepower engine, was in good operating condition and the pilot under those circumstances circled above Paxson Lake until he had obtained an altitude of 1,000 feet, then left Paxson Lake heading at a degree of [213] in-

(Testimony of Randall K. Acord.)

vidence of about 45 degrees to the saddle—towards the saddle—at a point on the saddle approximately 800 feet above the level of Paxson Lake and continued his climb at 70 miles an hour and had experienced no prior turbulence or light turbulence at the most and stopping at that very point, would that pilot in your opinion be exercising sound pilot judgment?''

The Witness: You mean he is 200 feet above the crest of the hill already?

Mr. Boggess: That's correct.

Mr. McNabb: Now, just a minute. Your Honor, the question doesn't state how far he was from that saddle and whether he had reached a point—where he was under the brow of the hill.

The Court: You can bring that up on your redirect.

Mr. McNabb: Very well.

The Court: Now, of course, if you can't form an opinion from the facts as given you, you can state that.

The Witness: Under normal conditions—that is—under ideal conditions, I would say that judgment would be okay, but the things he observed from the time he took off until he was at this point should have indicated to him what the wind was, the direction it was coming from [214] and whether he might encounter downdrafts at this point over the hill.

(Testimony of Randall K. Acord.)

Q. (By Mr. Boggess): All right, Mr. Acord, I believe that what you have in mind is that this man gained an altitude too fast in a 360 degree circle, is that correct?

A. Well, you said a while ago that he climbed to an altitude of a thousand feet. Whether it was one or two or three thousand, it doesn't matter actually. I brought that up as something I caught on the question a while back. But even if he climbed over the lake up and down or anyway, as long as he was a thousand feet heading for a 800 foot hill and still climbing and if it was an absolutely calm, cool evening, I would say the man was exercising good judgment. But what are the essential factors that enter into this thing that caused the accident? That wouldn't cause an accident if there were calm air, no turbulence, no downdrafts. He would have gone right on out, but something happened.

Q. That is sufficient. Now, if you will allow me to ask you another question. Then, what if that person were caught in an abnormal high velocity vertical air current at that moment?

Mr. McNabb: I object to that question, your Honor, on the ground there has been no testimony of any abnormally (interrupted). [215]

The Witness: He is just after theory, I believe, Judge.

Q. (By Mr. Boggess): And upon encountering that vertical air current of abnormally high velocity he dropped his nose, made a turn to the left of

(Testimony of Randall K. Acord.)

about 75 to 80 degrees and headed back towards the lake, continued to fall as his plane was headed back towards the lake, kept playing with his stick trying to feel whether he had any control over the aircraft and never felt any life in his stick or very little response in the stick and crashed into the ground. Do you think that that pilot having been caught in that unusual circumstance was doing all that he could to extricate himself from it?

A. Well, here is what the C.A.A. would say and what anyone else would normally say in a case like that. If the stick is dead like you say, the aircraft is stalled regardless of whether he is in a downdraft or loss of air speed. The thing to do is get that airplane flying first. The only way to get it flying first is to put her going straight ahead. I mean, that is the way to get it flying with minimum loss of altitude. When you do a turn, the stall speed of an aircraft is increased proportionately. There is a scale given by the C.A.A. for that—which means he has got to have more speed to do the turn. Now the question comes, did he have enough altitude when he observed this [216] abnormal downdraft for example as you were giving it to gain flying speed straight ahead and then do the turn, or did he fail to use good judgment in trying to gain speed and turning at the same time? That means he would lose more altitude than if he had gone straight ahead and then do the turn. So, you see you have got more factors (interrupted).

Q. Having been caught in such a circumstance,

(Testimony of Randall K. Acord.)

would the factor that behind you was a declining slope, would that offer some inducement to attempt to turn back towards the lake, Mr. Acord?

A. Say that again.

Q. Would the fact that behind you—ahead of you is a hill or the side of a hill and behind you the hill fades away to the lake, would that factor influence you in deciding whether or not to proceed directly ahead to regain control of your aircraft or attempting to turn and start back towards the lake?

A. That depends on the altitude you are about the time when you encounter this stall or this downdraft. If you were 400 feet like you were saying here a while ago, he can do a stall and should have been able to recover and do the turn and go on down the hill and still be losing altitude in a Super Cruiser, I would say.

Q. Then it is your opinion, Mr. Acord, that what a pilot should do upon encountering a vertical air current of abnormal [217] velocity is the same thing that he should do when he encounters a stall (interrupted).

A. I'll give you a little more theory here. Normally, downdrafts never carry an aircraft into the ground. The C.A.A. has gone into a lot of research on that. It's what they call ground effect. You have air coming down in a vertical direction downward and it hits the ground and swoops out and pressure is built up between the ground and this wind moving downward. As this pressure builds up when

(Testimony of Randall K. Acord.)

the downdraft first starts, it is going to go all the way to the ground and move out a little bit, but that's only for an instant. Then there is a pressure going to build up. Then your air is going to come down and start leveling off on the top of that pressure. Follow me? Helicopters work on that principle. That's the way they get off the ground. From there one you are in what they call more or less a stable air mass condition.

Q. Uh-huh. Would you describe that as a cushion of air?

A. That's exactly what it is.

Q. Do all vertical air currents encountered, Mr. Acord, have cushions?

A. They will to a certain extent if it is on the side of a hill. Naturally, air current is going to come down on the side of the hill and it is going to pour down the side of the hill like water. That's where you get chinook winds. That's [218] where that type—that's where you get that type of wind. But there is still a certain amount of cushion effect existing there. When an aircraft takes off on the ground, there is a pressure that builds up between the wing and the ground. That pressure varies according to the height of the wing off the ground, the size of the wing, the airfoil and everything, but you can get an airplane off the ground real quick especially on a hot summer day, but you get it above that ground effect or that cushion of air and she stalls.

Q. But (interrupted).

(Testimony of Randall K. Acord.)

A. You got to go on and get a little more speed.

Q. It is true, isn't it, Mr. Acord, that some vertical air currents as you have described do not have a cushion to enable a pilot to recover short of the ground?

A. Well, I don't know. But I do know that the C.A.A. has never definitely proved that an aircraft has ever been brought to the ground by downdrafts.

Q. You said a moment ago, Mr. Acord, that you had been reading these aviation safety discussion letters from (interrupted).

A. But they are (interrupted).

Q. (Continuing): —from D. M. Gretzer?

A. But they are to indicate to the pilot that he is in a stall and not in a downdraft. That's the reason for this training article. [219]

Q. Did you ever read aviation safety discussion number 8? A. Yeah.

Q. Have you? A. I have.

Q. That contains an excerpt of a letter from Professor Ragle?

A. Yes, I know Professor Ragle.

Q. (Handing document to witness): Read over the first paragraph. Don't read it aloud. Your Honor, may we have a 10-minute recess?

A. Just a minute. May I cover this while it is fresh in my mind?

Q. All right.

A. I know Professor Ragle and I have flown with Professor Ragle and so forth and I have no—

(Testimony of Randall K. Acord.)

I mean to say this in no way of judging the fellow's pilot ability—but the same thing could have happened right here to Mr. Ragle—Professor Ragle—as happened here, but who is going to be in that airplane to determine whether Professor Ragle was in a stall or in a downdraft. We are only taking Professor Ragle's word.

Mr. Boggess: That's good enough. May we have that recess now?

The Court: Yes, ten minute recess.

(At this time, a 10-minute recess was taken and thereafter the trial of this cause was resumed.) [220]

(Mr. Randall K. Acord resumed the stand as a witness.)

The Court: Counsel ready to proceed with the trial?

Mr. McNabb: Yes, your Honor.

Mr. Boggess: Ready, your Honor. I have no further questions at this time.

The Court: Any redirect?

Mr. McNabb: Yes, your Honor.

The Court: Very well. Proceed.

Redirect Examination

By Mr. McNabb:

Q. Mr. Acord, a portion of Mr. Boggess' questions were directed to you assuming that this aircraft were being operated without any turbulence

(Testimony of Randall K. Acord.)

or without any wind and proceeding toward this hill without any turbulence or any indication of a wind at all. And he asked you at that time if the pilot showed good judgment if he had no indication of wind and the next question was if shortly thereafter he struck a downdraft of high velocity and certain things happened and now I would like to know if it is possible for a reasonably prudent pilot to fly into a high velocity downdraft without having some prior indication that there was a downdraft? [221]

A. To have a downdraft of high intensity or high velocity, there's got to be a wind blowing somewhere, from some direction and it is got to be coming over something that is higher than he is to be in it or you can have what we call vertical air masses which are not dangerous and are not hazardous but they change your cruising speed in order to hold a constant altitude such as if you are cruising along at 5,000 feet and you maintain 5,000 feet constantly and that aircraft normally cruises in a calm stable air mass of 170, you might only be doing 160 through this vertical air mass. That is caused by a slight vertical movement of the air and you are in a slight climbing position at all times—a climbing attitude at all times to maintain that constant 5,000 feet and you might think there is something wrong with the airplane. That is the only other kind of downdraft that I know of other than what we are speaking of here. To have a

(Testimony of Randall K. Acord.)

downdraft of high velocity, you have got to have a high velocity wind and it has got to be coming over an object that is higher than you are. Or, you might be a little above it and still be encountering the overwash, you understand? It is still got to be a high velocity wind. If a high velocity wind is there, you will get this high velocity downdraft and then definitely you are going to be flying in it before you get to where the downdraft is.

Q. In other words, in this particular instance then, Mr. Heay knew or in the exercise of reasonable diligence, he should [222] have known that he was approaching a mass of air where he would encounter a downdraft?

A. We just said there was a 10 to 15 mile an hour wind on the lake (interrupted).

Q. Well (interrupted).

A. After looking at the pictures and the map here and from the way they say the wind was coming which would be from the northwest—the wind direction from the northwest (interrupted).

Q. There was testimony that Mr. Heay took off from Paxson Lake to the north and at that time there was a surface wind of 10 to 15 miles an hour.

A. Yeah. Well, that—was it straight on the nose? Apparently it was from his left slightly and he was taking off the lake this way and that would—a 15 mile an hour wind will cause a slight downdraft. I would say a 15 mile an hour wind is plenty velocity to recognize that. Otherwise, I wouldn't

(Testimony of Randall K. Acord.)

have taken off to the north. I would have taken off to the south, because he took off into the wind.

Q. Well now, is it conceivable that there could be a surface wind there on the lake and no wind—or wind in an opposite direction at a thousand feet over the lake or (interrupted).

A. There has been times when the wind velocity will vary like that, but they won't vary to any great degree, and maybe [223] ten to fifteen miles an hour at the most. Areas up higher follow a general direction of flow according to air masses and air pressures.

Q. Well now, I think that in this particular instance, the testimony is that Mr. Heay was approaching this saddle as you have heard.

A. And the wind was off his right wing, is that right?

Q. That is the way as I understand it but he says he didn't know there was any wind up there and he is proceeding and there is no wind at all.

A. Well, if he had a 15 mile an hour wind on that lake (interrupted).

Q. Let us assume it was absolutely calm as he approached this hill at a thousand feet altitude and approaching the saddle at a 45 degree angle. If Mr. Heay hit such a downdraft as to force him into the ground when he had 500 feet—between 400 and 500 feet altitude over the hill, should he not be exercising reasonable diligence have noticed that there was some wind blowing and he would

(Testimony of Randall K. Acord.)

thereby have had indications that he might strike a downdraft? A. I would say yes.

Q. In other words, are you going to run right out of a dead calm area into a downdraft that throws you 500 feet into the ground?

A. Not normally. [224]

Q. Did you ever hear of a situation in which you can fly out of an absolutely calm air and right into a downdraft that will throw you 500 feet into the ground? A. No.

Mr. McNabb: That's all.

Recross-Examination

By Mr. Boggess:

Q. Now, Mr. Acord, between the level of Paxson Lake—that is, above sea level approximately 2,580 feet—and the level of the—or the peak of the highest mountain on the west shore of Paxson Lake (interrupted).

A. It's about 4,400 feet.

Q. Would you step down here, please? Which according to the "X" on—indicate on this map is 5,280 feet (interrupted). A. Okay.

Q. (Continuing): —can there be as much as a 180 degree wind shift?

A. I would say no.

Q. You would say not. High—how high would you have to go in that country to encounter a 180 degree wind shift in your opinion?

A. Well, I would say you would have to go up

(Testimony of Randall K. Acord.)

past the slope of frontal conditions to get a 180 degree wind shift. [225]

Q. In your experiences as a pilot, have you encountered a 180 degree wind shift in 25,000 feet differential in altitude?

A. Oh, definitely, but you are going to have a little trouble getting a Super Cruiser to 25,000 feet. But what I'm getting at is you won't encounter a 180 degree wind shift at a thousand feet, not south of the Brooks Range.

Q. Now, assuming that Mr. Heay was approaching the saddle in a climbing attitude, having left the shore of Paxson Lake at an altitude above it of 1,000 feet; assuming that the direction indicated—direction of the wind as indicated on Paxson Lake remained the same as he climbed and assuming that he felt no gusts or turbulence in the wind, is it not possible under those conditions for him to have encountered without sufficient prior warning a vertical wind of such velocity as to push him into the ground?

A. Gentlemen, there is nothing going to sit up there and honk a horn for you when there's a down-draft up ahead of you. That falls back on human judgment—pilot judgment. If he took off to the north, he took off into the wind. The wind apparently was from the north or he wouldn't have taken off to the north like you have said. If there is a northwest wind blowing or whatever it happens to be and if there is mountains between you and the direction the wind is coming from, it is normal

(Testimony of Randall K. Acord.)

to assume that there is downdrafts there of some kind but the intensity will depend on the velocity of [226] the wind and the shape of the terrain. You can get downdrafts without turbulence as I said before. It depends on the smoothness of the hills and so forth.

Q. Would it be normal to assume, Mr. Acord, that you would encounter a downdraft of the intensity described under those circumstances?

A. I would say no because apparently he lost what, a thousand feet or so? No, I'll take that back. He was above the surface of the lake how much, a couple hundred feet? And from where the crash was over to the surface of the lake (interrupted).

Mr. Boggess: That's something that has not been testified to, your Honor, the distance from the shore line.

The Witness: He had to fall 5, 6, 7 hundred feet. Downdrafts of that intensity are not known in that type of terrain, that I know of, at least I have never encountered it.

Q. (By Mr. Boggess): Just a few more questions, Mr. Acord. Have you flown over that particular saddle which we have reference to?

A. Yes, I have.

Q. And how many times have you flown over that saddle?

A. Oh, I don't know, two or three times. I mean, I have circled all around that country. [227]

(Testimony of Randall K. Acord.)

Q. What attitude—what altitude did you clear that saddle when you flew over it?

A. Oh, gosh, it varied each time. Anywhere from 2, 3 hundred feet on up, but that was in different type aircraft.

Q. Well then, you have never flown over that saddle in a Piper Super Cruiser aircraft?

A. No, I haven't.

Mr. Boggess: That's all.

Mr. McNabb: That's all.

The Court: Just a minute. I want to ask you something. Suppose this pilot took off to the north and there was a wind blowing to the south, blowing right at him, 15 miles an hour; he takes off and he makes a turn of 180 degrees and comes back and going down wind—down south, that would put the wind back of him, wouldn't it?

The Witness: Yes, sir.

The Court: Then he cuts over to the right at an angle of 45 degrees to the hill and he gets over towards the hill side, the wind if it is still coming in the same direction would be an updraft, wouldn't it, instead of a downdraft?

The Witness: No, sir, because the wind is coming from the north. We speak of where the wind is coming from all the time.

The Court: Yes. [228]

The Witness: If he is taking off to the north into the wind, the wind is from the north and he is taking off into it.

The Court: Yes.

(Testimony of Randall K. Acord.)

The Witness: Then he does a 180 degree turn and starts south and he's got a tail wind.

The Court: Yes.

The Witness: Then he turns right 45 degrees?

The Court: Yes.

The Witness: And then back up here is a 5200 foot mountain between him and the wind, right?

The Court: Yes.

The Witness: Then you got a downdraft coming right over the mountain.

The Court: I don't think that mountain—I think the wind—you see it is 45 degrees. He is coming into it at a 45 degree angle between his course and the hills.

The Witness: Well, sir, then it doesn't make any difference what direction you're going as long as the mountain is between you and the wind. If you're going straight toward the mountain and the wind is coming over, you're going to have the same thing as any other angle because that wouldn't—because that downdraft is on the leeward side of the [229] mountain. The angle has no effect as to the downdraft itself. However, he was going at a 45 degree angle which would be an assistance to him to drop the nose and turn left and go on down the hill in case anything would happen, but it would still indicate that there is a downdraft on the south side of that mountain when the wind is from the north regardless of what angle he is approaching it.

The Court: All right.

(Testimony of Randall K. Acord.)

Mr. McNabb: Your Honor, I was going to show Mr. Acord this photograph and likewise show it to the court. Perhaps it will assist both of you in this particular discussion.

The Court: All right.

Mr. McNabb: Randy, is—this is the mountain which is marked “X” on this map.

The Witness: That’s the 5,200 foot hill.

Mr. McNabb: That’s correct, and as we have discovered, the wind was coming from the north evidently. We can’t tell whether it was directly out of the north or not but at any rate, Mr. Heay turned, made a 180 degree turn or perhaps something less because when he reached the end of the lake he didn’t turn 180 degrees. He made a 360 degree turn but then there is some doubt on whether he made the complete circle. Now, still that wind is coming down this [230] general direction all around this 5,200 foot peak which is shown there and the ink spot on the photograph represents the general vicinity of the crash.

The Witness: So apparently, the mountain is between him and the direction of the wind, is that correct?

Mr. McNabb: That’s the way I would see it. And I think, your Honor, by examining the photograph (interrupted).

The Court: Very well.

(Document handed to court.)

The Witness: That photograph, Judge, the way

it is pictured there, is looking to the northwest across the lake.

Mr. McNabb: Your Honor, do you have any further questions of this witness?

The Court: No, that's all.

Mr. McNabb: That's all, I guess, Randy.

The Court: I guess that's all.

Mr. Boggess: I have no further questions.

The Court: That's all then.

(At this time, Mr. Randall K. Acord left the witness stand.)

Mr. McNabb: I call Mr. Freericks at this time, your Honor. [231]

CHARLES JAMES FREERICKS

called as a witness in behalf of the Plaintiffs, having been first duly sworn, testified as follows:

Direct Examination

By Mr. McNabb:

Q. Will you state your name, please?

A. Charles James Freericks.

Q. Where do you reside, Mr. Freericks?

A. Here in Fairbanks.

Q. By whom are you employed?

A. Civil Aeronautics Administration.

Q. Are you acquainted with Mr. Heay, the defendant? A. Yes.

Q. Are you acquainted with Dean Phillips, one of the plaintiffs in this case? A. Yes, I am.

Q. Are you familiar with the airplane crash of

(Testimony of Charles James Freericks.)

the plane belonging to Mr. Phillips last year at Paxson Lake? A. Yes.

Q. Did you have any discussion with Mr. Phillips concerning that airplane crash?

A. On several different occasions.

Q. Did you have any discussion with Mr. Phillips concerning the motor of that airplane?

A. Yes. [232]

Q. Do you recall the first time that you discussed with Mr. Phillips after the crash the motor?

A. No, I don't, not the first time.

Q. Do you recall how soon after the crash that you discussed with Mr. Phillips the motor in that plane? A. No, I don't.

Q. Do you know whether the motor was ever removed from that airplane?

A. Yes, I removed it.

Q. Was anyone else with you when you removed it? A. Yes, Louie Frank.

Q. How long after the crash did you remove that motor, Mr. Freericks?

A. Not too long. I am not sure just how many days had elapsed. I would say a week, something like that.

Q. Was it any more than a week?

A. Gee, I am not sure.

Q. Was it less than a week or would you say it was 7 days? A. I am not sure.

Q. You think it was approximately a week?

(Testimony of Charles James Freericks.)

A. Seems like that. That's about the time it could be, I think.

Q. Now then, how does it happen that you went for the motor, Mr. Freericks?

A. Well, it was possible there might be some salvage, [233] something that could be used and Louie Frank decided to go up and see if there was.

Q. Did you go for that motor at someone's request?

A. No. I volunteered. Louie Frank wanted to see the airplane and the engine to see if it—if there was salvage and I said that I would go with him to look the airplane over and if there was any salvage, I would help him.

Q. Do you know whether Mr. Phillips requested Mr. Frank or yourself to go for that motor?

A. No, I don't.

Q. Well, do you know whether Mr. Kelly requested you to go down and get that motor?

A. No, I don't.

Q. Who took the motor out of the plane?

A. Louie Frank and myself.

Q. Did Mr. Gray ask you to go down and get that motor?

A. No, he didn't. No one asked me. I volunteered.

Q. Do you know whether they asked Mr. Frank to go and get it? A. No, I don't.

Q. Did you have any authorization to take the motor away from the plane?

A. None whatsoever.

Q. You didn't request from Mr. Phillips, Mr.

(Testimony of Charles James Freericks.)

Gray or Mr. Kelly the privilege of removing the motor from the plane? [234]

A. No, I did not. I went up to assist Louie Frank to remove the engine. I assumed that he had received permission from someone,

Q. Do you know whether he had or not?

A. No, I am not sure.

Q. Did he—did you talk to Mr. Frank about whether he had any conversation with any of the parties that I have just mentioned concerning the motor? A. Well, I didn't witness any.

Q. I say, did you talk to Mr. Frank to ask him if he had requested any of these men permission to get that motor? A. No, I did not.

Q. Did he say whether he had talked to Mr. Heay about it or not?

A. I'm—I don't think I ever asked him if he did but I was under the impression that he had discussed it with Mr. Heay.

Q. Had you ever talked to him—to Mr. Heay about getting the motor out of the plane?

A. Yes, I think I did. I mentioned the fact that I was going up with Louie to get the engine.

Q. And (interrupted).

A. If it was salvagable.

Q. And what did Mr. Heay say to that?

A. He said he thought it was a good deal if it was [235] salvagable. It would be useful to someone.

Q. Do you know whether Mr. Heay told Mr. Frank to get the engine or not?

(Testimony of Charles James Freericks.)

A. Well, I don't know that for sure, no. I feel assured that he had discussed it with Mr. Heay before going up after the engine.

Q. Do you know whether Mr. Frank asked Mr. Phillips, Mr. Gray or Mr. Kelly about going after it? A. No, I don't.

Q. Didn't discuss that with Mr. Frank at all?

A. No, I didn't.

Q. He didn't say anything to you about it, about asking any of the parties plaintiff to this suit about going after the motor?

A. Not to my knowledge.

Q. So it is your impression then that you went up for that motor at the request of Mr. Heay—that Mr. Frank went after the motor and you just assisted him? A. That's correct.

Q. At the request of Mr. Heay?

A. Well, not myself. Louie Frank, yes.

Q. Did you get the motor? A. Yes.

Q. Did you bring it back to Fairbanks?

A. Yes, I did. [236]

Q. Do you know what was done with the motor after it came back? A. I am not sure, no.

Q. You don't know what was done with it after that?

A. No. At the time, why it was taken off the truck at Doug's place, at Doug's house and after that I don't know what became of the engine.

Mr. McNabb: That's all.

Mr. Bogges: I have no questions, your Honor.

(At this time, Mr. Freericks left the witness stand.)

Mr. McNabb: At this time, your Honor, my other witness has not put in an appearance and therefore I have no alternative other than to rest. However, I do not by that wish to waive any rights that I may have to call Mr. Heay on rebuttal.

The Court: Very well. Call your next witness then.

Mr. Boggess: A mere technicality, your Honor, but Mr. Heay was examined on direct examination by plaintiff and he was excused temporarily while other witnesses were called and he did not resume the witness stand. So, I would like to cross-examine Mr. Heay at this time.

The Court: Yes. You didn't get a [237] chance to cross-examine.

Mr. Boggess: I did not have the opportunity.

The Court: Very well, you may.

(At this time, Mr. Douglas Heay, the defendant, resumed the witness stand and testified as follows:)

DOUGLAS HEAY

Cross-Examination

By Mr. Boggess:

Q. Doug, how often have you flown in the Paxson Lake area?

A. Well, quite often in the last four years. I would say that I have taken off from Paxson Lake

(Testimony of Douglas Heay.)

at least 50 times and from Paxson Lodge strip oh, four, five times that I know of on wheels.

Q. Now, those 40 or 50 take-offs were during the period of four years, is that correct?

A. Yes, I believe so.

Q. And would you just—would you be able to estimate the number of times you had landed and took off from Paxson Lake during the month of September in the fall of the year?

A. Well, in 1950 I would say at least 8 or 10 times. In 1949 probably 30 times.

Q. You—would you take off and land at Paxson quite often? I mean, if you went up there once, would you go to surrounding lakes in that [238] vicinity?

A. I would land at Paxson and go straight to the Tangle Lakes or go straight from here to the Tangle Lakes and maybe from Paxson shuttle into the Tangles or Swede Lake or Landmark Lake. There are a lot of those lakes lying back in the hills there.

Q. And leaving and approaching Paxson, what was your normal route of approach and (interrupted).

A. Well, if I were using Sportsman's Lodge as a base and I took off south, I would take off and immediately swing over the ridge there.

Q. By the ridge, do you mean the saddle?

A. The saddle there.

Q. On the west side of the lake?

A. Right.

(Testimony of Douglas Heay.)

Q. At what altitudes would you say you have flown across that saddle from time to time?

Mr. McNabb: Your Honor, I object to the question as not bearing on the issues in this case and not material as to what he did on previous or prior occasions.

Mr. Boggess: Only in this particular, your Honor. As Mr. Acord, plaintiffs' witness, stated, these matters are largely pilot judgment and certainly the past experience of this pilot in the particular area where an accident occurred would give him some indication as to what he should be (interrupted). [239]

The Court: Objection overruled.

The Witness: Well, on the southerly take-off, I have taken off and swung across the saddle and on northerly take-offs, usually I will swing almost as far as Paxson Lodge and come back, having gained my altitude and swing across the ridge. I have flown over that identical spot where I stacked up this time quite a few times.

Q. And at what altitudes (interrupted).

A. That (interrupted).

Q. (Continuing): —have you flown over there?

A. It varied—at varying altitudes, both returning and leaving Paxson Lake.

Q. What was the minimum altitude you have flown over the (interrupted).

A. Well (interrupted).

Q. (Continuing): —saddle?

(Testimony of Douglas Heay.)

A. I couldn't swear to that.

Q. If you know.

A. Well, I don't know. Usually when you're flying in those—in that part of the country unless you're on a long flight and steady course at high altitudes, you're watching where you're going rather than your instruments, other than your oil gauges.

Q. From your experience, Doug, would you be able to state generally at what range of altitudes, giving the minimum altitudes and the maximum altitudes, that you have crossed the [240] saddle?

Mr. McNabb: Well now, just a minute. He stated—the maximum has no place in this case and the minimum, he just stated he didn't know. I therefore object to the question.

Mr. Boggess: Your Honor, the maximum would have some bearing on this case because in making a determination at what altitude to cross the saddle, any turbulence that he might have experienced at higher altitudes that exceeded the turbulence that he experienced near the ground, would tend to make him choose the lower flight across the saddle.

The Court: All right. Objection overruled.

Mr. McNabb: There hasn't been any testimony that he found any turbulence at any altitude, your Honor.

Mr. Boggess: I am trying to lay the foundation for that.

Mr. McNabb: Well then, ask him.

The Court: I have overruled the objection.

(Testimony of Douglas Heay.)

The Witness: The highest I have possibly flown across that saddle was 2,000 feet above the saddle. That was on trips where I have been expecting another ship [241] on wheels to be waiting at Paxson Lodge for me or my wife to meet me at the Sportsman's Lodge and I have come in from Fairbanks heading for the Tangles and I go via Paxson Lake and maintain the altitude I used getting from Paxson over the summit and if I didn't see the plane or my wife in the car at Sportsman's Lodge, I would swing right on over and go into the Tangles without even making an approach to Paxson Lake and I would say 2,000 feet is about the highest I have ever gone across that particular saddle.

Q. (By Mr. Boggess): Is there any way at all, Doug, that you can estimate what the lowest altitude is that you have flown across that saddle?

A. Well, maybe I have—I might have gone as low as 100 feet at times as far as that goes.

Q. From those experiences of flying across the saddle between the altitudes that you have stated, have you observed that the air in any particular—at any particular altitude is more turbulent than the air at other altitudes?

A. I could not honestly say I had across that particular saddle.

Q. Have you ever experienced any severe turbulence in that area? A. Yes, I have.

Q. Was that severe turbulence associated with any other type of weather phenomena that you noted at the time? [242]

(Testimony of Douglas Heay.)

A. Usually extreme winds.

Q. Have you ever, when extreme winds were blowing, encountered a downdraft which—of the nature which you have previously described in that vicinity?

A. No. In all my flying up here, I don't believe I have encountered quite a downdraft that that was.

Q. Now, what was your destination that day?

A. My destination was a little lake just off the MacLaren River.

Q. Is that lake on this map?

A. I don't believe it is. It might. It shows two small lakes.

Mr. McNabb: Your Honor, I don't think his destination is material to this matter.

The Court: What is the materiality of it?

Mr. Boggess: The materiality of his destination, your Honor, is that there has been some testimony today that the most careful or cautious thinking pilot would do his flight to the windward of the mountains. Now, it is my contention that a pilot in mapping his flight plan takes more into consideration than what is the safest route. It is also the question of what is the quickest, most convenient route and one that will save the most fuel and yet not necessarily subject the aircraft to any undue [243] risk.

Mr. McNabb: Your Honor, the testimony was that if he wanted to go over on the other side of that hill where there was an updraft, he could have gained his altitude there, but it has nothing

(Testimony of Douglas Heay.)

to do with where he is going. He says he made one complete circle around the lake.

The Court: Well, objection overruled.

Q. (By Mr. Boggess): Would you mark with "D" your destination on that map? Now, Mr. Heay, will you step back down here? According to the terrain appearing on this map, if you had decided to fly to the windward of the mountainous area depicted thereon, what would your route have been between Paxson Lake and your destination?

Mr. McNabb: Your Honor, I think that question is not material to the issues involved in this case by any stretch of the imagination.

The Court: Objection sustained.

Mr. Boggess: I have no further questions at this time.

Redirect Examination

By Mr. McNabb:

Q. Doug, you recall that **downdraft** you testified to in which you lost 1200 feet?

A. Yes, right around Rainbow Mountain. [244]

Q. What kind of an airplane were you flying that day? A. Taylor Craft.

Q. Is that smaller than this one? A. Yes.

Q. How much smaller?

A. Well, it's two place rather than three and it has 65 horse Continental.

Q. You had 115 here? A. Right.

Q. This downdraft which you hit on the day of

(Testimony of Douglas Heay.)

the crash was more extreme than the one which you hit in the Taylor Craft?

A. I surely believe so.

Mr. McNabb: That's all.

Recross-Examination

By Mr. Boggess:

Q. Just a minute Doug. This prior accident that has been mentioned (interrupted).

A. What accident?

Q. Didn't you mention an accident?

A. No.

Mr. Boggess: Will the reporter read what he said?

Mr. McNabb: Re-read what he said. [245]

(All the questions and answers asked and given under redirect examination of the witness were read by the reporter.)

Mr. Boggess: No further questions, your Honor.
The Court: That's all, then.

(Mr. Douglas Heay left the witness stand.)

Mr. Boggess: I have to go out here, your Honor, and see if I have a witness.

Mr. McNabb: It's time for a recess, Bill, and (interrupted).

The Court: No, we will go ahead.

CHARLES JAMES FREERICKS

called as a witness in behalf of the Defendant, having been previously sworn, testified as follows:

Direct Examination

By Mr. Boggess:

Q. Where were you working last September, Jim? A. At Week's Tower.

Q. What kind of shift do you work at Week's?

A. Well, it varies.

Q. What time—what kind of a shift were you working last September? [246]

A. I am not sure. I think I was working around the clock at that time, different shifts and alternating every week.

Q. Do you recall any conversation having taken place in the tower in your presence and in the presence of Doug Heay and in the presence of Dean Phillips? A. Yes.

Mr. McNabb: Now, just a minute.

Q. (By Mr. Boggess): Concerning (interrupted).

Mr. McNabb: Just a minute. Go ahead.

Q. (By Mr. Boggess): Concerning the borrowing of a Piper Super Cruiser aircraft belonging to Dean Phillips? A. Yes.

Q. Approximately when did that conversation take—occur, if you recall?

A. The day of the month?

Q. Yes. A. I don't recall.

Q. Do you recall the accident that occurred at

(Testimony of Charles James Freericks.)

Paxson Lodge when Doug Heay crashed into the ground with Phillips' aircraft? A. Yes.

Q. Did that conversation occur on that [247] day? A. No, the day before that.

Q. Was there anyone else present at that time besides the persons I have named?

A. Did you mention Walt Bear?

Q. I didn't.

A. I think that Walt Bear was present, but I am not sure.

Q. What did Doug Heay say and what did Dean Phillips say if you recall with respect to borrowing of an aircraft?

A. Well, I recall that Doug wanted to use the airplane to shuttle I guess Jess Bachner and Ernie Hubbard back and forth so that they could fix this 170 they had previously—that had previously been damaged.

Q. And what aircraft did Doug say that he wished to borrow?

A. Dean's Super Cruiser.

Q. And did Dean at that time tell Doug that he would (interrupted).

Mr. McNabb: Now, I object to any leading questions.

The Court: Objection sustained.

Q. (By Mr. Boggess): What then did Dean say if anything in response to Doug's request to borrow the aircraft?

A. Well, Dean said that he could use the airplane. However at that time he said that he needed

(Testimony of Charles James Freericks.)

an airplane to get a moose or something that had been shot some place and he [248] had to ferry with this—he wanted the Fairbanks Air Service to ferry it back and forth to get this meat out, whatever it was he was going to get—and that if Doug would take care of that bill, well that he could use Dean's airplane.

Q. Now, did you make—would you state whether or not you visited Doug Heay's home on the evening of the accident? A. Yes.

Q. And what was the occasion of your visit?

A. Well, let's see. I was residing there at the time.

Q. You were? And was—would you state whether or not Mrs. Heay was home?

A. Yes, she was there.

Q. While you were present in Doug Heay's home, did Dean Phillips come to his home?

A. Yes.

Q. Would you state generally what was discussed in your presence at that time?

Mr. McNabb: Now, there is no proper foundation for that question, your Honor. I object to it.

Mr. Boggess: I will withdraw the question.

Q. (By Mr. Boggess): Was the value of the wrecked aircraft discussed at any time while you were present there at Doug Heay's home? [249]

A. Yes.

Q. If you recall, how did the subject of the value of the wrecked aircraft come up?

A. I don't recall.

(Testimony of Charles James Freericks.)

Q. If you recall, did Dean Phillips at any time state what the value of the aircraft was?

A. Yes. He stated that the value of the aircraft was \$3,000.

Q. While you were present, did Dean Phillips break—make any breakdown to show how he arrived at that figure? A. Not to my knowledge.

Q. While you were present, did Doug Heay make any promises to pay Dean \$3,000?

A. No.

Mr. McNabb: I object to that and move that the answer be stricken on the ground that it would be a conclusion.

The Court: Objection overruled.

Mr. Boggess: No further questions.

Cross-Examination

By Mr. McNabb:

Q. Did—what—you were present all the time that Dean was in the room with Doug?

A. Yes, I was. [250]

Q. You were in the same room with them all the time? A. Yes.

Q. Heard all their conversation?

A. I don't remember all of it.

Q. You probably don't remember all of it?

A. No. I don't have any reason to remember all of it. I was there during the conversation.

Q. Now, did—do you have any recollection at all of what Doug said when Dean said the plane was worth \$3,000?

(Testimony of Charles James Freericks.)

A. Yes. He didn't say anything right at the time. A short time later he said that that's a lot of money.

Q. He didn't say that that's a reasonable price?

A. No.

Q. Didn't say anything else?

A. Not to my knowledge.

Q. Now, is it possible that some time later during the conversation that he might have said something else in reference to that price and you wouldn't now recall it? A. Say that again.

Q. I say, is it possible that some time—at a later time during that evening—that Doug could have said something in reference to this price and you not now recall what he said?

A. It's possible.

Mr. McNabb: I think that's all. [251]

Redirect Examination

By Mr. Boggess:

Q. Were you still at Doug Heay's home when Phillips left? A. Yes.

Mr. Boggess: No further questions.

(At this time, Mr. Freericks left the witness stand.)

Mr. Boggess: Your Honor, I had understood that—from counsel and I think he will verify me on this, that he was going to take most of the day, if not all day, in the presentation of his case. Now, I have two witnesses, one Professor Ragle who is

out at the University, and he is busy today and I would call him today and notify him when to appear. I could have him here at ten o'clock, and then the other one is Mr. Hubbard, an eyewitness to the airplane accident. I can get him up here immediately after Mr. Ragle and probably finish with the defendant by tomorrow noon, and if that would be satisfactory, to continue the case at this time.

Mr. McNabb: Your Honor, it is quite true what Mr. Boggess said. In fact, the matter is I told him I would be quite sure I would require all day today. So, it is entirely my fault he doesn't have his witnesses here.

The Court: Very well, then. We will [252] recess until tomorrow at ten o'clock.

The Clerk: Court is recessed until tomorrow morning at ten o'clock.

(At 4:10 p.m. o'clock, the trial of this cause was recessed until 10:00 a.m. May 10th, 1951.)

Be It Remembered, that upon the 10th day of May, 1951, the trial of this cause was resumed, plaintiffs and defendant represented by counsel, the Honorable Harry E. Pratt, District Judge, presiding.

The Court: Counsel ready to proceed with the trial of the case of Phillips versus Heay?

Mr. Boggess: Ready, your Honor. I would like to call for my first witness Mr. Hubbard.

ERNEST HUBBARD

called as a witness in behalf of the Defendant, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Boggess:

Q. Would you state your name, please?

A. Ernest Hubbard.

Q. And where do you reside, Mr. Hubbard?

A. At 821 - 4th Avenue in Fairbanks.

Q. How long have you resided in the Territory of Alaska? [253]

A. Since the fall of 1937.

Q. What is your present occupation?

A. Well, I am engaged in the airplane business in the freighting business between the States and Alaska.

Q. What is the nature of your interest in that business?

A. I am a third owner in the enterprise. I own a third of the business.

Q. What enterprise is that, Mr. Hubbard?

A. It's Arctic Pacific, Inc.

Q. How long have you had an interest in that business? A. Since 1947, August.

Q. Do you hold any ratings from the Civil Aeronautics Administration?

A. Yes, I do. I am a licensed airplane and engine mechanic. The license (interrupted).

Q. When did you first obtain a license from the Civil Aeronautics Administration?

(Testimony of Ernest Hubbard.)

A. In 1934.

Q. Has that license been intact since that date?

A. Yes, it has.

Q. Did you have any association with the aircraft business prior to 1934?

A. Yes, I did. I have been in the aircraft business continuously since 1928.

Q. Have you had any experience as a flight mechanic? [254]

A. Yes, I have.

Q. Have you ever been a licensed pilot, Mr. Hubbard?

A. I was licensed in the last part of 1934 or possibly it might be early '35. I obtained a student permit and did continue on with my training and flew for some little time. As a matter of fact, I flew until 1937 without carrying it any further.

Q. Now, in your business—in your association with the aircraft business, have you flown on many occasions in light planes as a passenger?

A. Yes, I have; many times.

Q. Would you have any idea of how many hours you had flown in light aircraft as a passenger?

A. It would be hard to estimate accurately. I would say however not less than five to six hundred hours in very light aircraft.

Q. Mr. Hubbard, were you in the vicinity of Paxson Lake on the 20th day of September, 1950?

A. Yes, I was.

Q. What was your occasion for being there, Mr. Hubbard?

A. I had gone to Paxson Lake and another lake

(Testimony of Ernest Hubbard.)

in the near vicinity for the purpose of repairing a damaged airplane and preparing it for ferrying back to Fairbanks.

Q. Were you at Paxson Lake when the defendant, Douglas Heay, had an accident with an aircraft belonging to Dean [255] Phillips, Charles Gray and James Kelly? A. I was.

Q. Did you witness that accident?

A. I did.

Q. Would you step down here just a minute, Mr. Hubbard? Could you mark approximately on this map the vantage point from which you witnessed that accident? (Witness complied with request.) Just a moment, would you mark that with the letter "W"? And is that the Sportsman's Lodge?

A. Yes, it was Sportman's Lodge.

Q. Had you attempted to take off from Paxson Lake with the defendant, Douglas Heay, prior to the accident?

A. Yes, we had attempted to take off.

Q. Would you describe what conditions you observed with respect to wind at that particular time?

A. When we made up our mind to take off, the wind was from the south at about probably 10 to 15 miles an hour. However by the time we had warmed up the airplane and were ready for actual takeoff, the wind had died and we had a calm. Since float airplanes don't perform too well in a dead calm the little ship didn't want to get on the step and we, rather than punish the engine any more, turned around and taxied back to the Sportsman's Lodge

(Testimony of Ernest Hubbard.)

and I got out of the airplane. However, by the time we had returned to the Sportsman's Lodge, the wind had shifted 180 degrees. It was then coming from [256] the north at about the same velocity that it had originally been from the south, so we had a complete 180-degree wind change. I feel that if I had stayed in the airplane, it would have taken off without trouble.

Mr. Parrish: We object to that as being voluntary, your Honor, and not responsive to the question.

The Court: Yes.

The Witness: Sorry.

The Court: Just designate which part you wish (interrupted).

Mr. Parrish: That portion as to how he felt, your Honor.

The Court: May be stricken.

Q. (By Mr. Boggess): After you got out of the aircraft, Ernie, what did you do then?

A. Simply stood there and talked with my friends and watched the takeoff.

Q. Would you state whether or not you observed the takeoff of the defendant, his complete flight and the accident?

A. Yes, I did from the beginning to the end.

Q. If so, would you describe exactly what you observed with respect to takeoff, departure and accident?

A. Well, the airplane took off in a northerly direction [257] towards the north end of the lake, circled, made a 180-degree turn after climbing a

(Testimony of Ernest Hubbard.)

short period of time, climbed back in a southerly direction, passed my point of view, again made a 180-degree turn and flew north, at which time he having made apparently sufficient altitude to cross the ridge (interrupted).

Mr. Parrish: Now, we object to that portion of the answer and move it be stricken.

The Court: May be stricken. Just tell what you saw.

The Witness: About over the north end of the lake, the airplane made a left turn and headed in a westerly direction—I would say a southwesterly direction, and upon approaching the opposite shore of the lake or over the opposite shore of the lake, I suddenly noticed that the airplane had apparently lost all lift and was diving straight down to the ground in which position it did hit. However, before it started this dive, I observed the airplane making a left turn and it struck the ground headed towards the lake.

Q. (By Mr. Boggess): Approximately — from your position, if you know, or if you were able to estimate, approximately how far above the level of Paxson Lake was the aircraft when it departed from the shores of Paxson Lake?

Mr. Parrish: We object, your Honor, [258] as being without a foundation. He's asking—assuming a foundation in the question. We don't know whether the man could estimate it or not.

The Court: Objection overruled.

(Testimony of Ernest Hubbard.)

The Witness: I would estimate the airplane to be not less than 1,000 feet above the lake.

Q. (By Mr. Boggess): From your position, could you observe whether or not the aircraft was higher than the crest of the saddle towards which it was pointing?

A. Yes, I could very well and it was higher.

Q. If you observed, what was the attitude of the airplane as it approached the crest?

A. It approached the crest in a normal flying attitude, climbing somewhat.

Q. Do you have an opinion, Mr. Hubbard, of how far the aircraft was from the ground below it vertically at the point where it commenced its turn?

Mr. Parrish: Just answer yes or no, please.

The Witness: Yes.

Q. (By Mr. Boggess): If so, would you state that opinion?

Mr. Parrish: We object, your Honor, as being without a foundation; nothing to show he is able to [259] estimate how far he was above the ground.

The Court: Motion denied—objection overruled.

Q. (By Mr. Boggess): Go ahead.

A. I estimate the airplane to be not less than five to six hundred feet above the ground at the point where the trouble developed.

Q. Did you observe the condition of the weather as to visibility and ceiling at the time of the accident?

A. Yes, I did.

Q. Would you state what that condition was?

A. The weather—visibility and ceiling were un-

(Testimony of Ernest Hubbard.)

limited. There may have been a few very high clouds. By very high, I mean way above all the surrounding terrain.

Q. Would you state whether or not you observed the aircraft from the moment it commenced its descent until the moment it struck the ground?

A. Yes, I did.

Q. Did you in observing that aircraft approaching the ground notice any movement of the wings or any spinning tendency on the part of the aircraft?

A. No, none at all. It descended what appeared to be to me nearly vertical and at all times I could see the complete top of the wing. It struck the ground in that attitude as [260] far as I could see. There were a few little spruce trees. They went behind them. They couldn't be very high.

Q. And on which side of the lake was your vantage point with respect to the place where the accident occurred?

A. I was across the lake from the accident. I was on the east side of the lake.

Q. And you stated previously that the aircraft was pointed down towards the lake in its descent?

A. That is right.

Q. Would that be in line with your line of vision at that time?

A. Yes, almost directly.

Mr. Boggess: I have no further questions.

(Testimony of Ernest Hubbard.)

Cross-Examination

By Mr. Parrish:

Q. Mr. Hubbard, how long have you known Mr. Heay?

A. I believe since the summer of 1947.

Q. How did you become acquainted with him?

A. I don't recall the exact circumstances.

Q. Are you — would you say you were well acquainted with him or acquainted with him just as a general acquaintance or are you a good friend of his? How would you describe your [261] acquaintance?

A. I am not entirely sure I know what you mean. I would say we were good friends.

Q. How often do you see Mr. Heay?

A. Oh, every day or two.

Q. And is your wife and Mrs. Heay—are your wife and Mrs. Heay good friends?

A. I wouldn't say they were intimate friends. They are friends. They're friendly.

Q. Do they visit back and forth with each other and do you all go to each others' houses?

A. Well, we have on rather rare occasions.

Q. When did you first talk to Mr. Heay about this accident?

A. Well, I talked to him about it some directly after the accident, however, not much for the next few days until he recovered from some of his injuries.

Q. Now, did he say what caused the accident?

(Testimony of Ernest Hubbard.)

A. I believe he probably did. I don't exactly recall the conversation at the time.

Q. Well, now, what time was it?

A. Any discussion I think we had about the accident would have been after he returned to Fairbanks, which would be about 3 or 4 days after the accident.

Q. Well, do you remember what he said was the cause of it? Do you remember the substance of his conversation as to what caused it? [262]

A. No, I don't. I can't say that I recall specifically any of the words at that particular time.

Q. That wasn't my question. My question was do you recall the substance of his conversation as to what caused the accident? A. No.

Q. You testified just a minute ago that he did tell you the cause of the accident.

Mr. Boggess: I will object to that, your Honor. There is no testimony in the record from this witness that Douglas Heay did tell him the cause of the accident.

Mr. Parrish: I will ask that the record be read.

The Court: We don't have time to read it, Mr. Parrish.

Mr. Parrish: I believe that was one of his first answers that he had talked with him concerning the cause of the accident. (To Witness): Now, you are under oath, sir. The record is there.

Mr. Boggess: Now, wait a minute. There's no indication that the witness isn't cognizant of the fact that he is under oath or that he has made any

(Testimony of Ernest Hubbard.)

attempt to evade or not to answer your questions truthfully. It's not (interrupted). [263]

The Court: It is contrary to court rule for counsel to have disputes between themselves. If you have anything to say, address it to the court.

Mr. Boggess: I stand corrected.

The Court: I beg your pardon?

Mr. Boggess: I stand corrected.

Q. (By Mr. Parrish): Now, if—did you have any conversations then with Mr. Heay concerning the cause of this accident at any time after the accident?

A. I have had conversations with him about it after the accident, yes.

Q. Do you know when and where they were?

A. I would assume that—I don't know exactly.

Q. Do you remember that there were conversations as to the cause of the accident?

A. Yes, I do.

Q. Now, did he tell you what caused the accident?

A. He told me at one time or another—I can't say exactly when—that he had been caught in a downdraft.

Q. That was what he thought caused the accident then?

A. That's correct. That's what he told me he thought caused the accident.

Q. Now, you have never flown as a pilot in Alaska? A. No, officially I have not. [264]

(Testimony of Ernest Hubbard.)

Q. You have no log record of flying in Alaska as a pilot?

A. That's correct. I have not logged the time.

Q. But you are a licensed mechanic?

A. That's correct.

Q. And why did you go down to Paxson Lake now?

A. I went to Paxson Lake for the purpose of repairing and preparing for ferrying back to Fairbanks a damaged aircraft.

Q. Now, what aircraft was that?

A. The aircraft was a Cessna 170 belonging to Mr. Malloy.

Q. Where was it?

A. It was on the lake approximately 50 miles to the southwest—mostly west—of Paxson Lake.

Q. And who hired you to go over and repair that aircraft?

A. I wasn't hired. I did that as a (interrupted).

Q. Favor? A. As a favor, yes.

Mr. Boggess: I object to any further inquiry along these lines. It doesn't have any relevancy as far as the issues of the complaint and answer are concerned.

The Court: Objection will be overruled.

Q. (By Mr. Parrish): Did you go down to help Mr. Heay? A. Yes.

Q. Free of charge? [265] A. Yes.

Q. Because you were good friends?

A. Yes.

Q. Now, I believe you testified you saw this

(Testimony of Ernest Hubbard.)

crash. As I understood your testimony, the takeoff originally was—or the takeoff was northeast along the lake? A. That was correct.

Q. Now, how far were you from where the plane actually took off the water?

A. It's hard to estimate accurately.

Q. You don't know just exactly how far you were from the point of takeoff then when it took off? A. That would be awfully hard to say.

Q. And you are positive now that there was a complete, almost a complete 360-degree turn made in two 180-degree turns and—a 180-degree turn and then another turn before the plane lined out on its flight?

A. Would you repeat that again, please?

Q. You are positive that the plane made almost a complete 360-degree circle before it lined out on its flight across the pass?

A. It made a 360-degree circle, but not exactly as you have described it, I don't think.

Q. Well now, if you remember it distinctly, just will you state once more how that plane took [266] off?

A. It took off towards the north, northerly direction on the lake, and made a 180-degree turn and (interrupted).

Q. To the west?

A. To the west and proceeded southerly (interrupted).

Q. For about how far?

A. In a climbing attitude—I would say offhand

(Testimony of Ernest Hubbard.)

not less than a mile and possibly a mile and a half.

Q. Then what did he do?

A. He made another turn, 180 degrees, and headed back north.

Q. Then what happened?

A. After reaching what I estimate to be approximately the end of the lake, the north end of the lake, he again turned to a southwesterly direction and proceeded towards the west side of the lake.

Q. How far did he come back up the lake before he turned into the southwesterly direction?

A. He didn't exactly come back up the lake. You mean a southerly direction?

Q. No, when he came back north—yeah, south. Yes, excuse me.

A. (Pause.) Oh, I would say he probably came as much as a mile before he actually crossed over from the (interrupted).

Q. He didn't come back quite as far as he went north? A. That's correct.

Q. Did he get out over the trees or did he turn across the [267] lake when he made his turn into the west?

A. From my vantage point, I believe he crossed the water.

Q. You could be mistaken on that?

A. I could be all right, since I had no particular reason to carefully observe the same at the time.

Q. How far in your opinion over the water was he? How far from the end of the lake? How close to you? You were between—the plane was between

(Testimony of Ernest Hubbard.)

you and the end of the lake, was it not, when it turned southwest?

A. That's correct, however, not in exactly a straight line, you understand.

Q. Now, how far on your side of the edge of the lake was the plane when it turned southwest?

A. He was not on my side. He would be (interrupted).

Q. Let me ask you this way. How far was he from the south end of the lake when he turned southwest?

A. I would estimate that he was about at the end of the lake.

Q. About at the end of the lake? How far were you from the plane when you made that estimation?

A. I believe that would be about 2 miles, possibly two and a half.

Q. Do you believe your estimation would be accurate within a couple hundred feet, being 2 miles away?

A. Couple hundred feet and two miles? I would question that. [268]

Q. Well, likewise if you judged this plane to be 500 or 600 feet off the ground from a distance of over 2 miles, would you say it is possible—would you say there is a possibility of your being off at least 200 feet?

A. Not as much since I know that ridge across there to be somewhere between 700 and 800 feet high at that point and he was between that ridge

(Testimony of Ernest Hubbard.)

enough so I would have something to compare my height by.

Q. Now, if you were here (pointing to map) and this represented Paxson Lake and this represents the high hill and this represents the ridge (pause), if you were here, would you place the plane here (indicating)? Would you place the plane here or would you place the plane up in here where you could see across the ridge?

A. I think the drawing isn't exactly accurate. Say again what you consider to be the lake itself.

Q. This (pointing).

A. Well (interrupted).

Q. Now, the point I'm trying to make is from this graphic representation, was this plane backed by the hill or the nose of the hill or was the plane backed by sky?

A. No, it was backed by the hill.

Q. By the hill from where you were standing?

A. Correct.

Q. Now, could you then tell how far this plane was from the back of the hill from where you were standing? [269]

A. The large hill?

Q. Yes.

A. No, since it wasn't very close proximity to that large hill, that would be hard to do.

Q. And then, how would you tell how high it was from the ground?

A. Because of the shoulder of that ridge. That is a continuation on a part of that hill.

(Testimony of Ernest Hubbard.)

Q. Well, if the hill was behind the plane, you mentally drew a line then from the ridge underneath the plane to fix its height?

A. The drawing isn't exactly correct there. The lines of this saddle or ridge which you have do extend further north than they are indicated there. Therefore, there is a brow or edge to the ridge even though it would be between the lake and the high hill. Do I make myself clear?

Q. When you looked at the plane, was it backed by the hill or by the sky? A. By the hill.

Q. And you believe then that over two miles you can judge its height with relation to the hill within 200 feet? A. Yes, I do.

Q. And yet you can't judge the distance of the height of the plane off the end of the lake within 200 feet?

A. I might have if I had it impressed on my mind that hard. [270]

Q. Now, were you continually observing the flight of the plane? A. Yes, I was.

Q. It never left your vision?

A. That's correct.

Q. When the plane reached—started to settle, what happened?

A. I saw the airplane make a nose-down left turn towards the lake.

Q. How did it settle?

A. As near as I could see from my position, vertically or nearly so.

Q. Just as if there were a weight on it?

(Testimony of Ernest Hubbard.)

A. Nose first—a diving attitude.

Q. Let's straighten this out. The plane was flying a climbing attitude? A. Correct.

Q. Then what happened?

A. The nose dropped and the left-hand turn was made. The airplane then proceeded to—right to the ground in a nose-down diving attitude.

Q. Did the turn happen simultaneously with the dive?

A. I think the turn was started just about the same time the nose was dropped.

Q. Did you see anything unusual the flight of the plane [271] up to that time? A. No.

Q. Did it appear to be losing altitude?

A. No.

Q. Did it appear to be stalled? A. No.

Q. Was it to your appearances riding normally until the nose suddenly went down and the left turn was made? A. Yes, it was.

Q. Then from where you were, you couldn't tell whether the plane was settling or not, losing altitude? A. Do you mean before or after?

Q. Before the flight—before the crash.

A. Before the crash or before (interrupted).

Q. Before the turn.

A. Before the turn? It wasn't settling before the turn. If so, it would have to be almost so close to them that no one would be able to determine that.

Q. Did it appear to be maintaining flying speed?

A. Yes, it did.

Q. And it was in a climbing attitude?

(Testimony of Ernest Hubbard.)

A. Yes, mild.

Q. Did you state how high the plane was above the ground at the time the turn was made?

A. I estimated it to be not less than 500 to 600 feet. [272]

Q. You could have been off a little bit in either direction?

A. If anything, I would have—it would have been a little higher, if anything.

Q. A little higher? You don't know anything about how much time it would take a plane—how much height it would take to turn that light plane like that under normal conditions, do you?

A. How much height it would take to (interrupted).

Q. To turn a plane of that size under normal conditions if it was maintaining flying speed?

A. It shouldn't take any height. I mean, it shouldn't lose or gain any altitude in normal flight.

Q. Well, from your position on the lake then, what would cause the plane to suddenly turn nose down and crash?

A. Only thing I can account for it would be a very strong vertical current of air.

Q. That's the only thing you can think of?

A. That's the only thing I can think of.

Q. Could it have been that the pilot felt he couldn't make it over the ridge and started to turn back to the lake and went into a dive?

A. I think that's practically impossible.

Q. Why do you say that?

(Testimony of Ernest Hubbard.)

A. I observed the airplane to be above the ridge, flying in a normal manner and no mechanical trouble that I could [273] determine. The engine was running fine.

Q. It was maintaining flying speed?

A. Maintaining flying speed.

Q. And it was maintaining flying—maintaining altitude? A. Maintaining altitude.

Q. And the motor was working all right?

A. The motor was working fine.

Q. Why would the pilot turn?

A. If he should encounter a very strong vertical current which tended to carry him towards the ground (interrupted).

Q. But you said he wasn't being carried towards the ground. A. Before the turn was made.

Q. Yes. But why would he turn if he wasn't being carried toward the ground?

A. If he should start to be carried toward the ground, that would be his immediate reaction.

Q. But I didn't ask you that. I said you testified that he wasn't being carried toward the ground. He was maintaining altitude. You saw it.

A. That's correct. He was maintaining altitude up to the point (interrupted).

Q. He was maintaining flying speed?

A. That's correct.

Q. And he was in a climbing attitude?

A. A mild climbing attitude. [274]

Q. And although you were under the plane look-

(Testimony of Ernest Hubbard.)

ing up, you think he had sufficient altitude to go over the ridge? A. Yes.

Q. You weren't level with him, were you?

A. No.

Q. You couldn't tell just exactly how high he was, could you? A. In reference to what?

Q. I mean off the ground because you were looking up at him.

A. Not directly at a very great angle.

Q. And you were 2 miles away.

A. Approximately.

Q. It is possible that he was settling and that is the reason he made his turn, isn't it?

A. He would have to start settling (interrupted).

Q. But you testified he didn't.

A. I testified that I didn't see him start.

Q. But you saw the plane all the time.

A. I saw the plane all the time from 2 miles away.

Q. Then you are familiar with how fast light travels, aren't you? You are familiar with how long it takes you to see anything from 2 miles?

A. That's correct.

Q. And you testified he didn't settle before the turn. [275]

A. I will not say that he didn't settle any. As a matter of fact, 6 inches almost would give him the feel that something is wrong and at 2 miles, 6 inches isn't much.

Q. But you testified that he was maintaining climbing flying speed and was climbing?

(Testimony of Ernest Hubbard.)

A. Correct.

Q. Then he couldn't settle, could he?

A. He could if a very strong vertical current hit him. He could very suddenly start settling.

Q. But you testified that wasn't the case as you saw it.

A. I think you misunderstand.

Q. Well now, was he maintaining flying speed?

A. He was maintaining flying speed up to the time the trouble commenced.

Q. Was he maintaining a climbing attitude?

A. A mild climbing attitude.

Q. Was he losing altitude?

A. He wouldn't lose altitude in a climb.

Q. It is your testimony he wasn't losing altitude?

A. Up until the moment the trouble started.

Q. You never saw him losing altitude?

A. I saw him lose altitude (interrupted).

Q. Now, just a minute. Did you—before the turn, did you see him lose altitude before the turn?

A. I did not. [276]

Q. Now, you weren't on a level plane with this plane, were you?

A. No, I was not.

Q. You were looking up at him?

A. Yes.

Q. Now, will you tell me how you could tell that it was above the saddle?

A. Because I can see enough light way underneath the airplane to see across the top of the saddle by a large margin.

Q. But I thought you said the plane was between you and the big hill?

A. Of course.

(Testimony of Ernest Hubbard.)

Q. And how could you see the light between the plane and the saddle?

A. There has to be light (interrupted).

Q. No, I mean between the plane and the saddle?

A. Well, that saddle is very readily apparent. You can see that the same as you can see the airplane.

Q. Does the saddle run between the hill and yourself?

A. Oh, yes, it does.

Q. It isn't the same saddle that connects the hill then?

A. It isn't the saddle. I'm sorry. I have mis-spoken myself. I did not mean the saddle. It is the brow of the hill as extending from the saddle.

Q. Will you state as near as you can estimate how far you [277] were from the plane at the time it made the turn and crashed?

A. I would estimate from a mile and a half to two miles.

Q. Was it closer than it had been when it was at the end of the lake?

A. Yes, I believe it might be a little closer than the end of the lake.

Q. Did you see the plane that day? Did you see the plane that day?

A. Did I see the plane that day?

Q. After the crash?

A. No, I did not.

Q. Now, let me ask you. From the time the plane took off and headed north, I believe you testified he travelled about a mile and a half north?

(Testimony of Ernest Hubbard.)

A. Do you mean before his first turn back to the south?

Q. Let me review this. The plane took off to the south, is that correct?

A. No, the plane took off to the north.

Q. The plane took off to the north and he made a 180 degree turn to the left?

A. I believe it was to the left.

Q. And headed south for a mile and a half?

A. Approximately I would say.

Q. About how long did it take the plane to accomplish this?

A. Well, I don't know. I didn't time it. I had no reason [278] to even consider the time.

Q. Do you know the cruising speed on the plane?

A. The cruising speed?

Q. Flying at under full power in its attitude, about how fast would it have been flying?

A. If he were climbing at a normal rate, it would probably indicate about 70 miles an hour.

Q. And then he made another turn to the left?

A. I couldn't exactly say for sure that that turn from the southerly direction to the northerly direction was to the left or to the right but he did make a 180 degree turn and go back to the north.

Q. Yes. And he was still climbing?

A. Still climbing.

Q. And flew about a mile?

A. Flew to the end of the lake about from my vantage point and as I remember it.

(Testimony of Ernest Hubbard.)

Q. Well, it was a mile and a half down from where he made his turn? The first turn—he took off to the north and made a turn and flew back down south a mile and a half.

A. Approximately.

Q. Then I believe you testified he flew back a mile?

A. A mile? No.

Q. And turned across the lake?

A. No, I think you misunderstand. He flew north again [279] until I now estimate him to have been over the north end of Paxson Lake.

Q. How far was that?

A. Offhand I had estimated it about 2 or 2½ miles.

Q. Now, if he was flying at about a mile a minute airspeed and he climbed 200 feet a minute, what would be his normal rate of climb?

A. Well, that would depend on the pilot and what his intentions were. It could be anywhere from 50 feet a minute with that airplane. I suppose the maximum would be at that altitude I don't think over 500 or 600 feet a minute at best.

Q. How high was he over the end of the lake?

A. That would be hard to say. There is nothing at the end of the lake to judge altitude by.

Q. You don't know?

A. I hadn't given it any thought and wouldn't be able to say accurately or estimate it because of a lack of something to compare by.

Q. You couldn't compare it with the hill on the left?

A. Too far away.

(Testimony of Ernest Hubbard.)

The Court: I think we better have a recess at this time until a quarter past.

(At this time, a short recess was taken and thereafter the trial of this cause was resumed.)

The Court: Counsel ready to continue [280] this case?

Mr. Parrish: Ready, your Honor.

Mr. Boggess: We're ready, your Honor.

(Mr. Ernest Hubbard resumed the witness stand.)

Mr. Parrish: We have no further questions.

Redirect Examination

By Mr. Boggess:

Q. Ernie, you stated on direct examination that you estimated the altitude of the aircraft in flight to be approximately 1,000 feet above the level of the lake—Paxson Lake. At what point in the aircraft's flight did you make that estimation?

A. I would make that estimation as the aircraft approached the bluff on the far side of the lake. It was the only thing I had or know of in the vicinity where I know the height. I know the height of that bluff. Therefore, I could compare the altitude of the airplane with the known altitude of that bluff.

Q. In which direction was the plane flying then when you made that observation?

A. It was flying in a southwesterly direction.

Q. And if you know, approximately how far was

(Testimony of Ernest Hubbard.)

it on that [281] course from the westerly shore of Paxson Lake?

A. (Pause): It would be between a quarter and a half a mile probably.

Q. And at that point in the aircraft's flight, were you able to see day light between the top of the crest of the saddle and the airplane?

A. I was able to see under the aircraft and over the top of the bluff that forms the saddle, yes.

Mr. Boggess: No further questions.

Recross-Examination

By Mr. Parrish:

Q. How high is this bluff on the far side?

A. It is between 700 and 800 feet I believe.

Q. Is that the saddle?

A. The saddle is within a few feet of the same altitude, yes.

Q. How far was the airplane from the bluff when you made that estimation?

A. I estimate it to be from a quarter to a half a mile and probably close to a half from the lake shore. Therefore, it couldn't have been over say a quarter of a mile from the edge of the bluff probably. That is estimated.

Q. And how far were you from the airplane at that time?

A. Mile and a half to two miles. Probably closer to mile [282] and a half.

(Testimony of Ernest Hubbard.)

Q. Now, did you make all of these estimations at the time of the accident?

A. No. I am very familiar with that country and have been for several years and I know the hills pretty well and I can estimate in my mind somewhere within reason and I did walk across that—up that bluff and I have an idea from that.

Q. You are making these estimations now then from what you remember two years ago or a year ago last September? A. Some of them.

Q. And you didn't make them at the time? You didn't make any estimations at or about the time of the accident then?

A. Only as to the altitude of the airplane as I remember it.

Mr. Parrish: That's all.

Mr. Boggess: That's all, Ernie.

(At this time, Mr. Ernest Hubbard left the witness stand.)

Mr. Boggess: I would like to call Professor Ragle.

RICHARD CHARLES RAGLE

called as a witness in behalf of the Defendant, having been first duly sworn, testified as [283] follows:

Direct Examination

By Mr. Boggess:

Q. Would you state your name please?

A. Richard Charles Ragle.

(Testimony of Richard Charles Ragle.)

Q. And where do you reside, Mr. Ragle?

A. I resided—I reside at 910 Cowles Street in Fairbanks.

Q. And how long have you resided in the Territory of Alaska?

A. Continuous except for the years '45 and '46 since 1938.

Q. And was—what is your profession, Doctor?

A. The present time professor of geology at the University of Alaska.

Q. And what degree or degrees do you hold in the field of geology?

Mr. Parrish: We object now as being incompetent, irrelevant and immaterial as to what degrees he holds in geology.

Mr. Boggess: Geology, if the court please, is a study of the earth and the study of all factors affecting the earth. It is a very broad field and includes some phases of meteorology.

The Court: Objection overruled.

The Witness: I hold the degrees of bachelor and masters in geology.

Q. (By Mr. Boggess): And where did you obtain your study? [284]

A. My study was at Colorado College in Colorado Springs and Colorado University at Boulder, Colorado.

Q. Would you describe please generally what is included in the study of geology?

A. The study of geology is the application of chemical, physical and mathematical principles to

(Testimony of Richard Charles Ragle.)

the study of the earth which includes the atmosphere, the outer crust of the earth and the interior of the earth.

Q. Other than the studies of meteorology contained in your study of geology, have you had any other training in the field of meteorology?

Mr. Parrish: We object, your Honor. He has not testified he had any training in meteorology.

The Court: Objection will be overruled.

The Witness: Instruction in meteorology and aerodynamics for the dynamics of air movement in the United States Air Forces flying school in the study of climatology and study in the preparation for teaching the subject of meteorology and the subject of theory of flight and aerodynamics.

Q. (By Mr. Boggess): Are you a licensed pilot, Professor Ragle? A. I am.

Q. And when did you first obtain a license to fly?

A. First obtained a commercial license in [285] 1931.

Q. Had you obtained any license prior to the commercial license? A. None.

Q. Are you still a licensed commercial pilot?

A. I am.

Q. When did you commence your flight training, Professor Ragle? A. In October, 1930.

Q. And where was that?

A. That was at the Army Air Force Training Center, March Field, California.

Mr. Parrish: We will admit his qualifications as a pilot, your Honor.

(Testimony of Richard Charles Ragle.)

The Court: However, you are not required to accept his admission. You may show all of your qualifications if you like.

Q. (By Mr. Boggess): Are you familiar with what layman call light aircraft, Professor Ragle?

A. I am.

Q. Since you commenced flying in 1931 until this date, how many hours would you estimate that you have logged in piloting of light aircraft?

Mr. Parrish: We object to that unless it is more specific. I have no objection to his [286] estimating his log hours but what does he mean by light aircraft?

Q. (By Mr. Boggess): All right. Professor Ragle, what do you—how do you define the term “light aircraft”?

A. I think light aircraft are generally conceded to be those aircraft which are not sufficiently large to be used for commercial air transportation. That might include various different horse power categories. Generally it would be single engine and four place or smaller.

Q. Have you had experience, Professor Ragle, in the piloting of aircraft having horse power ranges of from 85 to 115 horse? A. I have.

Q. Would you be able to state approximately how many hours you have piloted aircraft within that category?

A. It would be in excess of 2,000.

Q. Were—did you have any connections, Pro-

(Testimony of Richard Charles Ragle.)

fessor Ragle, with the Air Forces during the last war?

A. I was on duty from October, 1941, through November, 1946.

Q. And what were your duties during that period?

A. The duties were varied. Engineering for cold weather testing and development; engineering for the lend lease processing of aircraft to Russia at Ladd Field, Officer in Charge of accident investigation and Search, Rescue and Survival for the Air Transport Command in Alaska; and Chief of [287] the Search, Rescue and Survival Section of Headquarters, Air Transport Command and Chief of Staff for Operations for the Air Rescue Service, Army Air Forces.

Q. Have you ever had any experience, Professor Ragle, in instruction in the operation of aircraft having single engine—aircraft having horse power range of from 85 to 115 horse power?

A. I have.

Q. And would you state the extent of your experiences as an instructor or the nature of your experiences as an instructor?

A. During the period 1939 through to October, 1941, I was coordinator and operator of Civil Pilot Training Program for the University of Alaska and operator of the flying school that gave the flight instruction to university students.

Q. Did you do any actual instruction yourself, Professor Ragle?

A. Yes, I did.

(Testimony of Richard Charles Ragle.)

Q. The last time you observed your log books—have you kept your log books up to date, Professor Ragle? A. I have not.

Q. How many total hours—when was the last time that you kept an active log?

A. The last time that I was engaged in the air transport industry and maintained a continuous log was in the summer of [288] 1947.

Q. Have you maintained any log since then?

A. I have logged some of them since then, but the log books are not up to date.

Q. From your recollection of the hours contained in those log books as of the last time that you regularly kept them and from your estimation of the number of hours flown since, what would you state was your total hours in operating aircraft of all types?

A. The figure would be approximately 4,600 hours.

Q. Now, Professor Ragle, are you familiar with Paxson Lake and the terrain in the immediate vicinity of Paxson Lake? A. I am.

Q. Have you ever flown (interrupted).

A. I have.

Q. (Continuing): —there? How many times would you state you have flown in the vicinity of Paxson Lake—immediate vicinity of Paxson Lake?

A. Probably not less than 20 times.

Q. Are you familiar, Professor Ragle, with the terrain within an area of 10 miles immediately west of Paxson Lake? A. I am.

(Testimony of Richard Charles Ragle.)

Q. Are you familiar with—I'll strike that question. Would you step down here a minute, Professor Ragle? Are you familiar with the contour of the peak indicated by the mark [289] "X" on this map?

A. I don't think I could answer that question directly. I see the contours on the map and I recognize the area involved.

Q. You will observe a blue line drawn between a point marked "X" on the map and a point marked double "X" on the map. That line indicated the crest of a saddle immediately west of Paxson Lake. Are you familiar with that saddle?

A. I am familiar with the area you are designating, yes.

Q. Now, Professor, Ragle, from your experiences as a pilot, would you describe the various techniques of take off and departure from a lake—from a lake in mountainous terrain such as you encounter in the vicinity of Paxson Lake?

Mr. Parrish: We object to it, your Honor as being incompetent, irrelevant and immaterial.

The Court: Objection sustained.

Q. (By Mr. Boggess): Now, are you familiar generally with the winds found in mountainous terrain?

Mr. Parrish: We object to that as being incompetent, irrelevant and immaterial.

Q. (By Mr. Boggess): Particularly the surface winds.

(Testimony of Richard Charles Ragle.)

Mr. Parrish: Same objection.

The Court: Particularly what?

Mr. Boggess: The surface winds. [290]

The Court: What was that, Mr. Reporter?

Court Reporter: The surface winds.

The Court: I think you should limit it right to the terrain in question.

Q. (By Mr. Boggess): Are you familiar with the nature of the surface winds at Paxson Lake generally as to their stability or variability?

A. (Pause.)

Mr. Parrish: He just asked you if you were familiar with it.

Q. (By Mr. Boggess): Just say yes or no.

A. I think your question is too broad to be answered.

Q. I see. Have you had an opportunity to observe, Professor Ragle, the tendencies, if such exist, for the wind to shift at the level of Paxson Lake at Paxson Lake?

Mr. Parrish: Now we object, your Honor, as being leading and suggestive. I think again that question is too broad. I am not sure whether he is just asking him whether he had a chance to observe or whether he knew.

Mr. Boggess: No, I had asked him whether he had had an opportunity to observe.

Mr. Parrish: Then I have no objection. [291]

The Witness: I have had, yes.

Q. (By Mr. Boggess): And would you state then what you observed (interrupted).

(Testimony of Richard Charles Ragle.)

Mr. Parrish: Now— go ahead and finish your question. I thought you had.

Q. (By Mr. Boggess, continuing): As to the condition of surface winds at Paxson Lake with respect to shift and variability?

Mr. Parrish: We object, your Honor, to his answering that question unless he shows what chance he's had to observe; laying a foundation for this answer.

Mr. Boggess: He's already testified, your Honor, that he has been in the vicinity of Paxson Lake at least 20 times.

Mr. Parrish: That hasn't got anything to do with whether he had a chance (interrupted).

Mr. Boggess: Also, your Honor, he is a geologist and meteorologist and an experienced pilot.

The Court: It seems to me you should go right to the point. Give him a hypothetical question showing the facts which you claim involved and see if he can take those facts and give you a conclusion as to results from—therefrom.

Mr. Boggess: Well, I didn't want [292] to go into this matter so abruptly, but at the court's suggestion, I will.

The Court: Very well.

Q. (By Mr. Boggess): Assuming these conditions to exist at Paxson Lake: ceiling unlimited, visibility unlimited and wind at the surface of Paxson Lake from a northerly direction having velocity from 10 to 15 miles an hour, a wind which has shifted to that direction from the south approxi-

(Testimony of Richard Charles Ragle.)

mately a 180 degree wind shift in the course of 20 to 25 minutes; assuming that a pilot in a Piper Super Cruiser aircraft having an engine of 115 horse power and carrying one passenger takes off to the north into the surface wind, climbs over the lake to an altitude of approximately 1,000 feet over the lake's surface and encountering at the most mild turbulence in his flight to altitude, departs from the northerly shore of the lake heading for a point on the crest of the saddle approximately 200 feet lower than his altitude, heads into this crest at an angle of incidence were he to meet it of 45 degrees in a climbing attitude and air speed of 70 miles, maintaining at least 500 feet altitude over the terrain vertically below him and being at least 1,000 feet out from the nearest terrain to him horizontally and stopping there, in your opinion, would that pilot under those circumstances be exercising sound pilot judgment? [293]

Mr. Parrish: We object to this question on several grounds, your Honor. In the first place, it doesn't take into consideration several important factors. One, that when this pilot turned into toward the saddle, he noticed a difference in ground speed and felt wind. This pilot testified to that. It will appear in the record (interrupted).

Mr. Boggess: It will not.

Mr. Parrish: He noticed a difference in the ground speed. Now, secondly, that he—in fact the words, your Honor, that he stated and we went into them two or three times are that—just a mo-

(Testimony of Richard Charles Ragle.)

ment. This won't take me just a second. He stated going south with the wind—I have it here in just a second. I will come back to it, your Honor, rather than take time. I have a note on it here what he said. Secondly, it doesn't take into consideration that it is up to the court to determine whether or not the man acted with due care or not. The question that—counsel is entitled to ask by his hypothetical question what in his opinion caused the accident. That this witness might be able to answer and then if he asks this witness how would he avoid the accident and how do you avoid those accidents, then the court can decide whether he acted with due care and if they want to show it is the practice to fly within 500 feet of the ground on the dumb side of the hill, that's still a matter of [294] fact, but it is taking the question of negligence away from the court and I don't think the witness is entitled to answer that.

Mr. Boggess: I would like to be heard on that latter point, your Honor.

The Court: Well, it seems to me that you should go on and give him the whole circumstance. You have got your plane only partly up to the dangerous point. You should give him then what happened. Give him the whole story.

Mr. Boggess: The reason, your Honor, that I have brought the plane only to the present point is because there is some suggestion in the evidence stemming from the use of their expert witness, Mr. Acord, that this pilot exercised poor pilot judgment

(Testimony of Richard Charles Ragle.)

prior to the time that he was caught in the condition which caused the crash.

The Court: That's correct. I remember that. Very well. The objection will be overruled.

Q. (By Mr. Boggess): You may answer the question. If you wish it read back (interrupted).

The Court: Do you remember the last question, Professor?

The Witness: Yes, I remember the question. I think again it is so broad and general that an [295] answer would be difficult to give.

The Court: Well, proceed then, Mr. Boggess:

The Witness: If (interrupted).

Mr. Parrish: I object to volunteering. He stated he couldn't answer.

The Court: Proceed with it then.

Q. (By Mr. Boggess): Professor Ragle, what other factors do you consider important in an answer to this sort of question that you would need to consider in order to arrive to an opinion as to what is considered sound pilot judgment?

Mr. Parrish: We object to that question, your Honor. That amounts to volunteer statements on the part of the witness.

Mr. Boggess: I am only asking the witness for factors, your Honor. I am not asking him if he (interrupted).

Mr. Parrish: You asked him—you're asking him to state the question that you're going to ask him.

The Court: Just a minute. As I pointed out,

(Testimony of Richard Charles Ragle.)

counsel should not indulge in discussions with one another.

Mr. Parrish: I am sorry. [296]

Mr. Boggess: I apologize.

The Court: I think you should give him the whole facts and then get his opinion. That is authorized by law and you can go into detail on side issues later.

Q. (By Mr. Boggess): The facts are as follows Professor Ragle; assuming that the facts are as follows, Professor Ragle (interrupted).

The Court: Start from where you left off and go on from there.

Mr. Boggess: Do you wish me to go on from the point that I left the airplane suspended in the air?

The Court: Yes, yes, and give him the whole story.

Mr. Boggess: All right.

Q. (By Mr. Boggess): Then the pilot continued to proceed towards the crest of the saddle in a climbing attitude, maintaining an air speed of 70 miles an hour; suddenly he observed the rise of the horizon in front of him; immediately he turned left—made a lefthand turn, dropping his nose, maintaining his throttle at their climb position and started back down the slope towards the westerly shore of Paxson Lake; as he descended he kept playing with his stick and he felt no life in the stick or little life in the stick; he maintained—he continued to [297] do this trying to feel whether his plane—the surfaces of his wing and so forth were taking hold;

(Testimony of Richard Charles Ragle.)

continued to play with the stick; it had no life and it was sluggish, until he struck the ground in a nose down attitude—he came in to the ground nose down. Now assuming those facts to be true, Professor Ragle, would that pilot, in your opinion, be exercising sound pilot judgment?

Mr. Parrish: We object on the same grounds, your Honor. Not all the facts are here and it doesn't take into consideration the wind testified to by the pilot himself and doesn't take into consideration when the nose was pulled down or when the turn was made and (interrupted).

The Court: You can take those points up on cross-examination. So, I will overrule the objection.

Mr. Parrish: I can't cross-examine this witness on them.

The Court: I beg your pardon?

Mr. Parrish: I don't think I can cross-examine this witness, your Honor. He just said he didn't know anything except what (interrupted).

The Court: Your objection is overruled. You may answer. Proceed with your answer, Professor.

The Witness: Assuming the facts as you stated them, I would find nothing wrong with the [298] pilot's technique.

Q. (By Mr. Boggess): The question I asked you Professor Ragle was whether or not, in your opinion, the pilot had used sound pilot judgment.

Mr. Parrish: We object to that answer, your Honor. It doesn't say when he exercised sound pilot judgment.

(Testimony of Richard Charles Ragle.)

The Court: I think the witness has already answered your question and answered it directly.

Mr. Boggess: Your Honor, I would like to have a ruling at this time from the court whether I am going to be permitted to get this witness' opinion as to whether or not the defendant exercised good sound pilot judgment prior to the time that he encountered what (interrupted).

Mr. Parrish: Now, just a minute. Your Honor, that isn't the question, and this witness has been outside and never heard anything about it and I think he is telling him what caused the accident.

Mr. Boggess: I said as this defendant testified, your Honor.

The Court: Your witness has answered your question. I think he saw nothing to complain of in the pilot's action.

Mr. Boggess: I have no further [299] questions.

Cross-Examination

By Mr. Parrish:

Q. What do you mean by you found nothing wrong with his technique?

A. All of the operations necessary to fly the aircraft, manipulation of controls, the choice of approach, reaction as he got in trouble, technique, all of those processes required in manipulating the aircraft.

Q. What are the causes of a crash of an aircraft? What causes an airplane to fall out of the air and strike the ground?

(Testimony of Richard Charles Ragle.)

A. I am afraid the question is too broad to be answered.

Q. Let me ask you this: Can anything other than pilot error or mechanical or functional failure of the aircraft cause it to strike the ground?

A. Yes.

Q. What?

A. A source of a number of accidents has been the movement of the air masses itself.

Q. Then it is your contention that air mass can push a plane right out of the air and cause it to strike the ground?

A. No.

Q. What is your contention? [300]

A. An aircraft is a vehicle that is operating in a tenuous fluid body and all of the movements of that body are imposed on the aircraft as long as it remains in that body, whether the movements are horizontal or vertical. They are a factor of the total movement of the aircraft itself.

Q. Now, that isn't what I asked you. I asked what is—is it your contention that air masses can cause a plane to crash?

A. I am sorry. That's not the way you asked the question.

Q. Well, I will ask you that now.

A. And the answer to that specific question must be yes.

Q. Air masses can cause a plane to crash?

A. Definitely.

Q. Now, under what circumstances will air masses cause airplanes to crash?

(Testimony of Richard Charles Ragle.)

A. There are a number of circumstances.

Q. Let me change my question so we don't waste too much time. Is it your opinion that in this case under the facts that Mr. Boggess gave you that an air mass caused this plane to crash or can you make a statement as to what caused the plane to crash?

A. Under the facts as they have been given to me, it would appear that only one possibility existed (interrupted).

Q. Wait just a minute. The facts as they have been given to you on the witness stand here? [301]

A. On the witness stand, today.

Q. Go ahead.

A. Yes. Only one possibility exists and that that the aircraft was in a downward moving air mass moving with velocity in excess of the maximum rate of climb of the aircraft.

Q. Now, you are familiar with that country over there? A. I am.

Q. And you are familiar with that particular dome and saddle? A. That's right.

Q. Now in your opinion, Mr. Ragle, what caused—just a minute—in your opinion if this pilot flew within 500 feet of the dumb side of the hill, 500 feet of the ground, and was caught in an air mass, is there any pilot error in such a move?

A. No.

Q. There is no pilot error to fly within 500 feet of the ground on the dumb side of the hill?

A. It is necessary moving from point to point.

(Testimony of Richard Charles Ragle.)

Q. Now, was the—is it necessary over Paxson Lake?

A. Yes. Paxson Lake is practically surrounded by hills and in order to depart from or approach it, you must fly on the down side. As you have said, of hilly country and within 500 feet of the ground (interrupted).

Q. I mean at the place where the plane crashed here. Is [302] it necessary to fly within 500 feet of the ground? A. Obviously not.

Q. Do you regard it as safe now? Do you regard it as safe to fly within 500 feet of the ground on the leese side of that hill?

A. Under the circumstances recorded here (interrupted).

Q. But do you regard it as safe?

A. Your question is too broad to be answered.

Q. Let me ask you this way. Under normal circumstances, do you have the opportunity on Paxson Lake to gain all the altitude you want before you attempt to cross those passes?

A. Within certain limits, you would be able to (interrupted).

Q. Is there any reason why you can't climb an airplane to its full limit over Paxson Lake without going into the hills? A. Economically, yes.

Q. Now, what did you answer?

A. The operation of an aircraft is a comparatively expensive thing.

Q. Oh, I am not concerned with that. I am asking you do you have room to climb the airplane?

(Testimony of Richard Charles Ragle.)

The Witness: Your Honor, do I have to answer that when he talks to me in that manner?

The Court: Well, I think you should curb yourself a little bit, be a little more considerate. [303]

Mr. Parrish: Your Honor, all I want him to do is answer the question.

Q. (By Mr. Parrish): Now, do you have room to climb a Piper Cruiser airplane to its limit of altitude over Paxson Lake without crossing the hills? A. It can be done, yes.

Q. Is there any reason—it can be done? Now, how wide is Paxson Lake, if you know?

A. I don't have the exact figures.

Q. Now, if it—if you can climb an airplane to the limit of its altitude over Paxson Lake without crossing the hills, why did you say it was necessary to fly under this hill at 500 feet?

A. You are misinterpreting my words.

Q. You didn't say that?

A. I did not say it.

Q. Is it reasonable to expect that there is air currents, vertical air currents next to hills?

A. That condition would always exist, yes.

Q. And is it reasonable to assume that if caught in vertical air currents, a plane will crash?

A. In comparison to the number of times that aircraft are caught in vertical air currents, the number of crashes that ensue are very small. [304]

Q. And could that be because people do not fly close to hills or because they always fly through vertical air currents? A. Neither.

(Testimony of Richard Charles Ragle.)

Q. Is it a practice to stay away from hills with an airplane if it is at all possible?

A. I am afraid your question is too broad to be answered.

Q. Is it a practice to stay away from hills where there might be vertical air currents where you have the opportunity to stay away from them?

A. I am afraid that your question is still too broad to be answered.

Q. Is it a practice to disregard the existence of vertical air currents next to hills? A. No.

Q. What is the practice?

A. The practice is to always approach a hill particularly on the leeward side with caution and that—at such an angle that any departure from your flight path can take you away from that potentially dangerous area.

Mr. Parrish: That's all. I think that's—we would like to have a recess now, your Honor.

The Court: Very well. Recess until two o'clock.

(At 12:06 o'clock p.m., the trial of this cause was recessed until 2:00 o'clock p.m.) [305]

(At 2:00 o'clock p.m., May 10, 1951, the trial of this cause was resumed.)

The Court: Counsel ready to proceed with the trial?

Mr. Parrish: Ready, your Honor.

(At this time, Mr. Ragle resumed the witness stand.)

(Testimony of Richard Charles Ragle.)

Mr. Parrish: We have no further questions.

Redirect Examination

By Mr. Boggess:

Q. Professor Ragle, what is a vertical air current, the type normally encountered in mountainous terrain?

A. In any moving body of air where—other than perfectly smooth terrain, conditions exist on the lee-side of every hill where there will be a low pressure circulation of air. Part of that air will be moving parallel to the main body. Part of it will be descending vertically behind the obstruction. Part of it will be moving from one side to the other around the outlines of the obstruction. These so-called vertical movements are merely part of this turbulent circulation.

Q. Now Professor Ragle, assuming that on the surface of Paxson Lake the wind was coming from a northerly direction at [306] from—at a velocity from 10 to 15 miles-an-hour at the time Douglas Heay took off and assuming further that some 20 to 25 minutes previously, the wind had been coming from the opposite direction at the same velocity and assuming further that the accident previously described occurred from five to ten minutes after take-off, would you be able to determine from that fact of wind shift in that period of time at what direction the wind was blowing at an altitude from 2,500 to 3,000 feet above the surface of Paxson Lake?

(Testimony of Richard Charles Ragle.)

A. There would be no essential relationship (interrupted).

Mr. McNabb: Now, just a minute, please.

Mr. Parrish: He didn't ask him what. He just asked him if he could determine it.

Q. (By Mr. Boggess): All right, just yes or no, Professor Ragle.

A. Under those circumstances, the question is too broad to be accurately answered.

Q. From your familiarity with the region in the immediate surrounding terrain and Paxson Lake itself and assuming that the wind shift did occur and from your studies as a meteorologist, what significance if any would you attach to that fact of wind shift?

Mr. Parrish: We object to that, your Honor, as being incompetent, irrelevant and immaterial [307] and partially based on a hypothetical question and partially based on his opinion and not within the issues of this case that I can see.

Mr. Boggess: If the Court please, it is within the issues of this case because counsel has repeatedly referred to Mr. Heay flying on the down side of the mountain. Now, if the air flow may be different at an altitude of 2,500 to 3,000 feet above the lake than it is on the surface of the lake, then without going at least as high as the peak itself, a person would be unable to determine what the flow of air above was and thus be unable to determine what in fact was the leese side of the hill. Now (interrupted).

(Testimony of Richard Charles Ragle.)

The Court: Objection overruled.

The Witness: Would you restate the question, please?

Mr. Boggess: Would you read the question back, Mr. Reporter?

(The question was read to the witness as follows: "Q. From your familiarity with the region in the immediate surrounding terrain and Paxson Lake itself and assuming that the wind shift did occur and from your studies as a meteorologist, what significance if any would you attach to that fact of wind shift?")

The Witness: The wind shift represented massive turbulent air flow and had no relationship to wind [308] aloft.

Mr. Boggess: That's all, Professor Ragle.

Mr. Parrish: That's all.

The Court: That's all then, Professor.

(Mr. Ragle left the witness stand.)

Mr. Boggess: I would like to call the defendant to the stand.

The Court: Very well.

DOUGLAS HEAY

called as a witness in his own behalf, having been previously sworn, testified as follows:

Direct Examination

By Mr. Boggess:

Q. Doug, would—did you sell the engine from a salvage from the wreckage?

Mr. McNabb: I object to that as calling for a conclusion.

The Court: I couldn't understand the question. Just a minute. Will you read it, please?

Mr. Boggess: I will reframe the question.

Q. (By Mr. Boggess): Did you sell the engine salvage from the wreckage, Doug?

Mr. McNabb: I object to that as [309] calling for a conclusion.

The Court: Objection overruled.

The Witness: I gave Louie Frank permission to go up and remove the engine from—before the snow came in there.

Q. (By Mr. Boggess): Did you sell it to Louie?

A. Yes, I did.

Q. How much did you sell it to Louie for?

A. He didn't have money at the time I gave him the engine and he paid me off \$400.00 I think around the 8th or 10th of April.

Q. Did you sell any other equipment belonging to that aircraft, Doug?

A. Well, I accepted a check for \$150.00 for the skis on the aircraft.

(Testimony of Douglas Heay.)

Q. Is that the only equipment appertaining to that aircraft that you sold? A. Yes, it is.

Q. Have you ever seen any other salvage belonging to that aircraft?

A. No (interrupted).

Mr. McNabb: I object to that on the ground it is incompetent, irrelevant and immaterial to the issues; not material to the issues of this case whether he had [310] seen it or not—any of the salvage.

The Court: Objection sustained.

Q. (By Mr. Boggess): Doug, have you ever flown in a Piper Super Cruiser aircraft other than that belonging to the plaintiffs?

Mr. McNabb: I object to that question on the grounds it is not material to the issues involved in this case and on the further grounds it is leading and suggestive.

The Court: What would be the relevancy of it?

Mr. Boggess: I am going to lead up, your Honor, to the matter of values that this witness could have purchased within a week or two of the time of the accident a Piper Super Cruiser of this model and make having the accessories which this plane has as testified to and being in equally good condition (interrupted).

Mr. McNabb: Now, wait a minute. Your Honor, I object to this man testifying here.

The Court: Your question is irrelevant to show anything of that sort. You are asking him if he has flown in one.

Q. (By Mr. Boggess): Have you negotiated for

(Testimony of Douglas Heay.)

the purchase of a Super Piper aircraft make and model like that you wrecked that day? [311]

Mr. McNabb: I object to that question on the ground it is not material to the issues in this case whether he negotiated or not for another airplane. It has nothing to do with the case we are interested in here or the issues in this case.

Mr. Boggess: The question is preliminary, your Honor. I am trying to get up to the asking price of (interrupted).

Mr. McNabb: He can ask that if he wants to.

The Court: Well, proceed then to the point.

Q. (By Mr. Boggess): All right. What was the asking price, Doug?

Mr. McNabb: I object to that as no proper foundation (interrupted).

The Court: Objection overruled.

Mr. McNabb: Your Honor, he hasn't stated—he hasn't stated what he is even talking about. The question is what was the asking price and we have no way of knowing what he was talking about even. He testified (interrupted).

The Court: He connected it up with the plane you mentioned (interrupted).

Mr. Boggess: I am—I will rest, [312] your Honor.

The Court: Very well.

Mr. McNabb: I don't have any questions.

The Court: That's all then.

(Mr. Heay left the witness stand.)

Mr. Parrish: If the court please, could we have a—we didn't know what time it would take to finish with the witnesses of the defendant and we have a man who is out on Week's Field and he has to come in. Could we have an opportunity to call him and get him in here? He is working.

The Court: How long would it take?

Mr. Parrish: I don't think it would take over twenty minutes, your Honor.

The Court: Very well. We'll take a recess until 25 minutes to 3:00.

(At this time, a recess was taken and thereafter the trial of this cause was resumed.)

The Court: Counsel ready to proceed?

Mr. Parrish: Ready, your Honor. At this time, the defendant—the plaintiff would like to call Hawley Evans. Would you come up and just raise your hand in front of the clerk? [313]

HAWLEY N. EVANS

called as a witness in behalf of the Plaintiffs, having been first duly sworn, testified as follows:

Direct Examination (Rebuttal)

By Mr. Parrish:

Q. State your name, please.

A. Hawley N. Evans.

Q. What is your occupation? A. Pilot.

Q. For what firm do you—are you employed or are you (interrupted).

(Testimony of Hawley N. Evans.)

A. Fairbanks Air Service.

Q. Will you state the—are you a licensed pilot?

A. Yes.

Q. Will you state the nature of your flying experience, Mr. Evans?

A. Well, I have been flying since 1942, as a commercial pilot and military pilot and I have about 6,000 hours now.

Q. What type of aircraft?

A. Well, all types from the lightest to the biggest.

Q. Are you familiar with flying in Alaska?

A. Yes.

Q. How long have you flown in Alaska?

A. Since 1946.

Q. Are you presently engaged in flying in Alaska? [314]

A. Yes.

Q. What is the nature of that flying?

A. Flying instructor and business work—charter work.

Q. Can you state whether or not there are any common practices among Alaskan pilots with regard to flying in hilly or mountainous terrain?

Mr. Boggess: I will object, your Honor, unless he confines himself to the area of the accident in particular.

The Court: It is necessary to make it general, is it?

Mr. Parrish: I was just trying to show the common practice of flying in mountainous terrain or hilly terrain among pilots.

(Testimony of Hawley N. Evans.)

The Court: Objection overruled.

Q. (By Mr. Parrish): Is there such a practice?

A. Well, it depends on the wind and the terrain. It depends on the condition of the day.

Q. Now, what—is there any such practice?

A. Well, in what respect? You mean altitude or how close you are flying or speed in which you must fly?

Q. Is there any practice with regards to approaching high hills or high mountains? Now do pilots normally handle their aircraft on approaching high (interrupted). [315]

Mr. Boggess: I insist, your Honor, we confine ourselves to conditions existing at Paxson Lake. What is a high mountain or what is a low mountain? What is a hill?

The Court: Yes, I think it would do better to limit him to conditions of that sort.

Q. (By Mr. Parrish): Are you familiar with the Paxson Lake area? A. Yes.

Q. Are you familiar with the terrain in and around Paxson Lake? A. Yes.

Q. Will you describe generally the terrain surrounding Paxson Lake?

A. Well, the lake runs north and south and there are low hills on either side of the lake and on the upper end of the lake which is to the north.

Q. Is that on the northwest side of the lake?

A. Well, there are hills from the southeast to the southwest running through the north area.

Q. Is there any practice followed by pilots in

(Testimony of Hawley N. Evans.)

taking off from Paxson Lake if you are flying around those hills?

Mr. Boggess: First, your Honor, I think we better confine this to an aircraft of the nature involved in this accident. [316]

The Court: I think that is a good objection.

Q. (By Mr. Parrish): Is there any practice in flying in and around Paxson Lake on these hills in light aircraft such as a Piper Super Cruiser?

A. Well, the only thing you can say on that is that if you had quite a bit of wind or turbulence, you naturally stay away from any hills until you gained sufficient altitude to clear the hills. In other words, I wouldn't fly next to a hill if it was a wind blowing unless it was on the upwind side.

Q. Let me ask you this. If a flight was being made from Paxson Lake and the airplane a Piper Super Cruiser seaplane with a 115 horsepower Lycoming engine and the takeoff was made in a northerly direction; one turn to the left of approximately 160 degrees and the plane had arrived at an altitude of a thousand feet above the lake and proceeded in a southwesterly direction at approximately 45 degrees angle approaching a hill of the height of 4,500 feet on the northwest end of the lake and the plane was gaining altitude at full power and flying at an air speed of approximately 65 to 70 miles per hour, the plane was about 800 to a 1,000 feet from the crest—from the hill and 400 or 500 feet above the ground and a wind was coming over the hill toward the [317] plane from approxi-

(Testimony of Hawley N. Evans.)

mately a northwesterly direction with little or some turbulence and all the controls and motor was functioning properly on the plane and it went out of control and crashed, falling almost directly to the earth nose first; assuming all these facts to be true, could you state with reasonable certainty the probable cause of the accident?

A. Well, I would say that if it is below the crest of the hill and the wind was on the down wind side, you would imagine he ran into some sort of a downdraft.

Q. How do you avoid those downdrafts?

A. Well, to stay away from hills until you reach a sufficient altitude to clear the hills safely. In other words, you would stay out over the lake, in my opinion, in that particular area.

Q. Will you state that again?

A. I would stay out over the lake until I reached a sufficient altitude. If there was a wind blowing in that direction, you would expect a downdraft I should think. Things change so much all the time it is hard to say for sure whether you are going to expect a downdraft and then again you might not get it.

Q. If you didn't know whether to expect a downdraft or not under these circumstances and you intended to cross this hill or the low saddle between the—on the west side of the lake, would you—would there be any general practice [318] among pilots as to what action to take under those circumstances?

A. Well, yeah. I would think a normal climb

(Testimony of Hawley N. Evans.)

over the lake until you reach sufficient altitude to cross the hill. I wouldn't just go barging right up the hill and expect to go across it if there was a wind blowing like that.

Q. Would you, if you weren't certain there was a wind blowing?

A. If I had very calm air and there was no indication of any wind, I would stay 5 to 600 feet above the ground and climb at an angle to the hill.

Q. If there was any turbulence on the lake, what would your reaction be?

A. Well, you might expect some downdraft near the hill on the downward side of the hill.

Q. Would you fly within 500 feet of that hill?

A. No, not—it depends on the severity of the downdrafts. If it was a rough day, I would stay away well clear of the hill.

Q. Can you tell in advance of coming to a hill whether there will be a downdraft or not?

A. Yes, you can expect a downdraft on the down wind side. If you have a wind blowing from the northwest direction and you're climbing into a hill with the wind blowing down over the hill, you would expect to encounter a downdraft so you [319] would stay away from there.

Q. If making a turn towards the hill you were aware that your plane was gaining ground speed as you turned along the hill, could you normally expect wind coming over the hill?

Mr. Boggess: He is assuming something, your Honor, that there has been no testimony to, that

(Testimony of Hawley N. Evans.)

after he made his turn into the hill he gained ground speed.

Mr. Parrish: I think there is evidence. I think the defendant gave evidence to that.

The Court: Objection overruled.

Q. (By Mr. Parrish): If when you turned you felt an increase in ground speed or ascertained an increase in ground speed, could you expect a downdraft?

A. Yes. Well, you mean you're turning down wind?

Q. That's right.

A. Yeah—no, you wouldn't necessarily expect a downdraft I don't believe. If you reach that point and you got a downdraft, it would be too late to do anything.

Q. Would you fly into that sort of a position?

A. No.

Q. Is that good practice to fly into that sort of a position? A. No.

Q. Is it good practice to fly yourself into a position [320] where you can't fly out of it?

A. No, it isn't.

Q. Is there or is there not any rules relative to flying in that country around Paxson Lake to stay far enough from hills until you can get back to water or pull out of a downdraft if you should hit one?

A. Yes, there is a rule of more or less a rule of thumb.

(Testimony of Hawley N. Evans.)

Q. Will you state what that rule is, how and when it is applied?

A. Depending on the wind conditions, if you have any wind conditions at all, you would naturally stay away from any hills on the downwind side. Usually, you depend on the hills to give you a little lift by getting over on the upwind side. If the wind starts to go up it will help you climb faster, but we don't ever climb on the downwind side of a hill.

Q. You don't ever climb on the downwind side?

A. No.

Q. Why don't you climb on the downwind side?

A. Because you just don't climb as fast and it could be dangerous if you hit a downdraft.

Q. Why would it be dangerous?

A. Well, your air is coming so fast, your airplane can't possibly make any headway against it and the airplane can't take care of it. These small airplanes won't take care of it. [321]

Q. Can a pilot with several hours experience ordinarily tell which way the wind is blowing?

A. How many hours?

Q. Oh, 1,500. A. Yes.

Q. Are any instruction—is any instruction normally given in pilot—to pilots training concerning flying close to hills?

A. That's one of the requirements, yes.

Q. Do you recall the hill at the north end of the lake (interrupted). A. Yes.

Q. Northwest end of the lake? A. Yes.

Q. Now, if you had come off the lake and arrived

(Testimony of Hawley N. Evans.)

at an altitude of 1,000 feet and turned to the left towards the hill and you were going south downwind, would you—in your opinion, would a reasonably prudent pilot fly within 500 feet of the ground under those circumstances?

A. Well, I don't think you would complete a turn and go back down the lake until you could feel out the wind and see what it was doing. I wouldn't necessarily hit right out I don't believe.

Mr. Parrish: That's all. [322]

Cross-Examination

(Rebuttal)

By Mr. Boggess:

Q. Mr. Evans, if you—in gaining altitude, if you took off to the north close to the north end of the lake and climbed, turned and continued your climb to the south for a couple of minutes, turned a 180-degree turn, continued your climb north until you reached approximately the north shore of the lake at which point you have a 1,000 feet altitude, an altitude of 200 feet higher than the altitude of the crest towards which you were headed, the crest of the saddle, you had encountered no turbulence or mild turbulence at the most, the wind at the surface of the lake was steady and smooth from 10 to 15 miles an hour, then you at all times maintained at least a thousand feet from the nearest point horizontally on the terrain with at least 500 feet from the terrain, motor functioning perfectly, climbing at a speed of 70 miles an hour and your

(Testimony of Hawley N. Evans.)

destination—would you step down here a minute—and your destination was that small lake marked “D” from Gulkana Lake and the line marked “X,” double “X” represents a line through the crest of the hill. Under those circumstances, would you have been using good pilot judgment?

A. You took off to the north?

Q. That’s correct.

A. Then we turned south? [323]

Mr Boggess: Just a moment. Mr. Reporter, will you read back that question to the witness, please?

(The question was read to the witness as follows: “Q. Mr. Evans, if you—in gaining altitude, if you took off to the north close to the north end of the lake and climbed, turned and continued your climb to the south for a couple of minutes, turned a 180-degree turn, continued your climb north until you reached approximately the north shore of the lake at which point you have a 1,000 feet altitude, an altitude of 200 feet higher than the altitude of the crest towards which you were headed, the crest of the saddle, you had encountered no turbulence or mild turbulence at the most, the wind at the surface of the lake was steady and smooth from 10 to 15 miles an hour, then you at all times maintained at least a thousand feet from the nearest point horizontally on the terrain with at least 500 feet from the terrain, motor functioning perfectly, climbing at a speed of 70

(Testimony of Hawley N. Evans.)

miles an hour and your destination—and your destination was that small lake marked “D” from Kulkana Lake and the line marked “X,” double “X” represents a line through the crest of the hill. Under those circumstances, would you have been using good pilot judgment?”)

The Witness: Yes, well, it doesn't look to me like the airplane went up very fast, figuring [324] out mentally the man flew for 7 minutes before—by the time (interrupted).

Q. (By Mr. Boggess): Aside from that.

Mr. Parrish: No, let him answer the question.

The Witness: If a man isn't climbing very fast, he is evidently not getting a very good lift out of that area there, so you wouldn't fly very close to the hills. He is climbing at about 150 feet per minute which is not very fast and if your airplane is that sluggish and if you have a wind blowing over that hill (interrupted).

Q. (By Mr. Boggess): Just a moment. Answer my question after I make this further explanation—that he reached his altitude in $4\frac{1}{2}$ —5 minutes.

A. Five minutes, that would be 200 feet a minute up, wouldn't it, which is not really very much. I believe those airplanes do around 5 to 600 feet a minute.

Q. What if it were only $4\frac{1}{2}$ minutes? Then what is your answer under those conditions?

A. He would be doing better and he wouldn't be encountering too much of a downdraft in that area.

(Testimony of Hawley N. Evans.)

Q. Then in that case, would he be exercising good pilot judgment assuming the facts as I stated them? [325]

A. Yes, he would if he was very sure that he wasn't going to get this wind over that hill.

Q. Well, under those circumstances (interrupted).

A. Maybe out over the lake he was getting a pretty good lift from the water.

Q. But I testified he—I assumed he encountered no turbulence or mild turbulence at the most. Was he using good judgment under those circumstances—good pilot judgment?

A. Well, again it just depends on the wind. If—as far as I can see, if he was 200 feet you say above the crest of the hill and he arrived at that altitude in 4 minutes, the airplane was going up at about the proper rate of ascent and a man should assume unless there was a wind blowing that he would get over the hill properly.

Mr. Boggess: That's all.

Redirect Examination

(Rebuttal)

By Mr. Parrish:

Q. Now Mr. Evans, in your flying experience, have you ever heard or do you know of any instance where a man in one minute felt no turbulence at all and in the next minute was in such a downdraft that it pulled the plane clear out under him and into the ground? Is that reasonably so?

(Testimony of Hawley N. Evans.)

A. Well, right at this moment, I can't think of any, no. Usually, if you're going to have any sort of a downdraft, [326] you are going to have (interrupted).

Mr. Boggess: That's all. You've answered his question.

Q. (By Mr. Parrish): Now, if there was any wind blowing under the circumstances that Mr. Boggess gave you, would he be acting as a reasonable pilot?

Mr. Boggess: That question has already been answered, your Honor.

The Court: Well, I would rather have it made clearer. Objection overruled.

Q. (By Mr. Parrish): Under the circumstances that Mr. Boggess gave you, if there was a wind blowing, would you feel that he was exercising reasonable diligence in flying across the saddle at that height of 500 feet? A. No.

Mr. Parrish: That's all.

Mr. Boggess: I have no further questions.

Mr. Parrish: That's all, Hawley. Thanks very much.

(At this time Mr. Evans left the witness stand.)

The Court: How much time do you [327] gentlemen want for argument?

Mr. McNabb: One hour, your Honor.

The Court: One hour?

Mr. McNabb: Yes, sir.

The Court: You think you would need that much?

Mr. McNabb: As I sit here at the moment, I can't tell, your Honor. If I don't feel that I need it, I certainly won't take the court's time.

The Court: Well, all right. We will limit you to one hour.

Mr. Boggess: I can assure the court that my argument will not be nearly so long.

The Court: Very well, proceed.

Mr. McNabb: Your Honor, this cause of action (interrupted).

The Court: Are you electing which one you're going to stand on?

Mr. McNabb: Is that necessary, your Honor?

The Court: Why, I think so.

Mr. McNabb: Well, I didn't know it was necessary to elect.

The Court: I think it is.

Mr. McNabb: Well, so far as I am [328] concerned, that's a new and startling development in this case which I had not anticipated and I believe that the court is—so far as I am concerned, it is—we are not required to elect. However, if that is the court's ruling, then I have no alternative than to do so.

The Court: Yes, I will require you to elect.

Mr. McNabb: Well, your Honor, it is my opinion then that the defendant in this case after having crashed that airplane purchased it and I will proceed on that score.

The Court: That is, you are abandoning your amended one which was on negligence?

Mr. McNabb: It is not my intention to abandon either cause of action. I think it is my opinion that we have proved that he was negligent and that he also purchased that airplane.

The Court: Well, you will go ahead with your argument and if you have any authority that show that you don't have to elect, I will be glad to have them.

Mr. McNabb: Well, I will move at this time, your Honor, that we recess this matter until I have had an opportunity to advise myself on that score.

The Court: I can't do that. You have an attorney, don't you? [329]

Mr. McNabb: Yes, I do, sir.

The Court: Proceed with your argument, then.

Mr. McNabb: You want me to confine my argument to one issue?

The Court: No, I'm going to let you argue on both. You stated which one you would elect.

Mr. McNabb: Then do I understand correctly? I may argue both causes of action?

The Court: Yes.

Mr. McNabb: Very well.

(At this time, Mr. McNabb presented argument to the court.)

(Upon conclusion of Mr. McNabb's argument, Mr. Boggess presented his argument to the court.)

(Mr. McNabb presented further argument to the court and informed the court that he relied on the theory of negligence.)

The Court: Very well. I will find for the plaintiff on the ground of negligence.

Mr. McNabb: Thank you, your Honor.

The Court: In other words, the defendant was negligent. Findings of fact and conclusions of law and judgment may be drawn accordingly.

(At 3:30 o'clock p.m., the trial [330] of this cause was concluded.)

United States of America,
Territory of Alaska—ss.

I, Charles Belida, Official Court Stenographer for the above-named court, do hereby certify as follows, to wit:

That upon the 7th, 8th, 9th and 10th days of May, 1951, I attended all the court proceedings had upon those days in the trial of the above-named cause;

That I recorded in shorthand all of the oral proceedings had in the above-named cause on the dates above mentioned;

That the foregoing pages numbered 1 through 331, both inclusive, constitute a full, true, complete and accurate transcript from my original shorthand notes.

Dated at Fairbanks, Alaska, this 23rd day of June, 1951.

/s/ CHARLES BELIDA,

Official Court Stenographer.

[Endorsed]: Filed June 26, 1951. [331]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, John B. Hall, Clerk of the above-entitled Court, do hereby certify that the following list comprises all proceedings as per Designation of Record by Appellants in the above-entitled cause, viz.:

	Page
1. Complaint	1
2. Answer	3
3. Amended Complaint	5
4. Second Amended Complaint	8
5. Answer to Second Amended Complaint....	12
6. Affidavit for Attachment	13
7. Undertaking for Attachment.....	14
8. Attachment Writ and Affidavit of Service..	15
9. Summons	16
10. Motion to Dismiss Complaint.....	17
11. Notice of Hearing on Above Motion.....	18
12. Order Granting Motion to Dismiss Com- plaint	19
13. Notice of Setting for Trial.....	20
14. Notice of Setting for Trial.....	21
15. Affidavit of Service of Above Notice.....	22
16. Order Setting Cause for Trial.....	23
17. Plaintiff's Subpoenas	24
18. Trial by Court.....	28
19. Motion to Dismiss and to Strike.....	29
20. Order and Trial by Court.....	30
21. Findings of Fact and Conclusions of Law..	35
22. Judgment	37
23. Cost Bill	38

	Page
24. Objections to Plaintiffs' Cost Bill.....	39
25. Clerk's Ruling on Above Objections.....	40
26. Notice of Appeal from Clerk's Ruling.....	41
27. Motion for New Trial.....	42
28. Motion to Set Hearing in re New Trial....	44
29. Order Sustaining Clerk's Ruling on Cost Bill and Denying a New Trial.....	46
30. Notice of Appeal.....	47
31. Supersedeas Bond	48
32. Designation of Record.....	50
33. Transcript of Proceedings at Trial (Pages 1 to 331, incl.).	
34. Exhibits of both parties in brown manila envelope.	

Witness my hand and the seal of the above-entitled Court this 30th day of July, 1951.

[Seal] /s/ JOHN B. HALL,
Clerk of the District Court, Fourth Judicial Division,
Territory of Alaska.

[Endorsed]: No. 13042. United States Court of Appeals for the Ninth Circuit. Douglas Heay, Appellant, vs. Dean Phillips, Charles Gray and James Kelly, Appellees. Transcript of Record. Appeal from the District Court for the Territory of Alaska, Fourth Division.

Filed August 2, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 13042

DOUGLAS HEAY,

Appellant,

vs.

DEAN PHILLIPS, CHARLES GRAY and
JAMES KELLY,

Appellees.

STATEMENT OF POINTS

The appellant states that the points upon which he intends to rely on this appeal are as follows:

1. That the Trial Court erred in denying defendant's Motion to Dismiss or the alternative, to Strike the second, further and alternative cause of action contained in plaintiffs' Second Amended Complaint. Said Motion appears at page 29 of the original certified record. The Court's order denying said Motion appears at page 5 of the Transcript of Proceedings at Trial.

2. That the Trial Court erred at page 4 of the Transcript of Proceedings at trial in ordering the trial reset for hearing one day after plaintiffs filed their Second Amended Complaint.

3. That the Trial Court erred in denying defendant's Motion for three days' continuance. Defendant's Motion appears at page 7 of the Transcript

of Proceedings at Trial and the Court's order denying said motion appears at page 9 thereof.

4. That the Trial Court erred at page 330 of the Transcript of Proceedings at Trial in permitting the plaintiffs to change their election of remedy from one of contract to one of negligence after defendant had made his final argument.

5. That the Trial Court erred in denying defendant's Motion for a New Trial on the first three grounds assigned in said Motion. Said Motion appears at page 42 of the original certified record. The order denying a new trial appears at page 46 of the original certified record.

/s/ WILLIAM V. BOGGESE,
Attorney for Appellant.

Receipt of Copy acknowledged.

[Endorsed]: Filed August 6, 1951.

[Title of Court of Appeals and Cause.]

DESIGNATION OF RECORD

The appellant hereby designates, by reference to the pages of the original certified record, the following portions of said record which are material to the consideration of this appeal:

	Pages
Complaint	1- 2
Answer	3- 4
Amended Complaint	5- 7

	Pages
Second Amended Complaint.....	8-11
Answer to Second Amended Complaint.....	12
Motion to Dismiss Complaint.....	17
Order Granting Motion to Dismiss Complaint.	19
Motion to Dismiss and to Strike.....	29
Findings of Fact and Conclusions of Law....	35
Judgment	37
Motion for New Trial.....	42-43
Order Sustaining Clerk's Ruling on Cost Bill and Denying a New Trial.....	46
Notice of Appeal.....	47
The following pages, inclusive, of the Tran- script of Proceedings at Trial as numbered by the Official Court Reporter.....	1- 9
and from the following line on the bottom of page 327: "The Court: How much time do you," to the bottom of page 330.	
This Designation of Record and the Statement of Points filed herewith.	

/s/ WILLIAM V. BOGGESS,
Attorney for Appellant.

Receipt of Copy acknowledged.

[Endorsed]: Filed August 6, 1951.

[Title of Court of Appeals and Cause.]

ADDITIONAL DESIGNATION OF RECORD

The Appellees hereby designate the entire record in the above-entitled cause; same includes all of the pleadings, the official Court Reporter's transcription of the proceedings, together with all identification and exhibits herein.

/s/ GEORGE B. McNABB,

/s/ ROBERT A. PARRISH,

Attorneys for Appellees.

Receipt of Copy acknowledged.

[Endorsed]: Filed August 10, 1951.

